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No. OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

SHERRY HEARN,
Petitioner,

v.

THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did a mass campus police "dog sniff" of the exterior of parked vehicles owned by public school employees and students on the parking lot of a public school constitute a "search" within the meaning of the Fourth Amendment, and if so, was such a "search" reasonable under the circumstances absent a demonstrable government interest, "reasonable suspicion" relative to any particular employee or student, or "special need," as required by *National Treasury Employees' Union v. Von Raab*, 489 U.S. 656 (1989), *O'Connor v. Ortega*, 480 U.S. 709 (1987), and *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995)?

2. May a public employer, acting through police officers in its employ, rely upon the so-called "automobile exception" to the Fourth Amendment to enter an employee's parked and unattended vehicle without a warrant and seize alleged contraband, where no exigent circumstances existed sufficient to justify the search?

3. May a public school system terminate a tenured teacher for violating its "Drug-Free Workplace" policy based upon the seizure of alleged contraband by campus police during a search of her parked vehicle without a warrant and without her consent, in violation of the Fourth Amendment and the school's own policies, which heightened Petitioner's reasonable expectation of privacy by providing that no searches of employees' vehicles would be conducted without their consent?

4. Did the provisions of Respondent's "Drug Free Workplace" policy, requiring public school employees to undergo urinalysis drug testing upon "reasonable suspicion" and defining reasonable suspicion in vague, ambiguous and overbroad terms, comport with the guidelines set forth by this Court in *National Treasury Employees' Union v. Von Raab*,

489 U.S. 656 (1989) and *O'Connor v. Ortega*, 480 U.S. 709 (1987)?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Petitioner HEARN and Respondent THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM).

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... .i-ii
LIST OF ALL PARTIES iii
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES vii
OPINIONS BELOW 1
JURISDICTION 1
TEXT OF CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND REGULATIONS INVOLVED 2
STATEMENT OF THE CASE 2

I. THE COURSE OF PROCEEDINGS 2
II. STATEMENT OF FACTS 3

REASONS FOR GRANTING THE WRIT 13

I. CERTIORARI IS APPROPRIATE IN THIS CASE, WHERE A PUBLIC SCHOOL EMPLOYEE WAS TERMINATED ON THE BASIS OF ALLEGED CONTRABAND SEIZED DURING A MASS CAMPUS POLICE "DOG SNIFF" SEARCH OF THE SCHOOL PREMISES AND THE EMPLOYEE'S PARKED AND UNATTENDED VEHICLE, AND WHERE NO CLEAR RULE PERTAINS IN THE CIRCUIT COURTS REGARDING THE CONSTITUTIONALITY OF SUCH SEARCHES 13

A. No Clear Rule Pertains in the Circuit Courts Whether a Canine "Sniff" of a Public Workplace and of the Exterior and Interior of an Employee's Parked Vehicle Constitutes a "Search" Under the Fourth Amendment 13

B. No Clear Rule Pertains in the Circuit Courts Whether a Canine "Sniff" of a Public Workplace and of the Exterior and Interior of an Employee's Parked Vehicle Is A Reasonable Search Under the Fourth Amendment Absent "Reasonable Suspicion" or "Special Need." 16

II. CERTIORARI IS APPROPRIATE WHERE THE ELEVENTH CIRCUIT HAS ENGAGED IN AN UNPRECEDENTED AND DANGEROUS EXTENSION OF THE SO-CALLED "AUTOMOBILE EXCEPTION" TO THE WARRANT REQUIREMENT TO PERMIT A PUBLIC EMPLOYER TO SEIZE CONTRABAND FROM A CLOSED COMPARTMENT IN AN EMPLOYEE'S PARKED AND UNATTENDED VEHICLE, ON THE PRETEXT OF ENFORCING THE WORKPLACE "ZERO TOLERANCE" DRUG POLICY 19

III. CERTIORARI IS APPROPRIATE INSOFAR AS PETITIONER'S CASE PRESENTS THE IMPORTANT ISSUE WHETHER A PUBLIC EMPLOYER MAY TERMINATE A TENURED EMPLOYEE BASED UPON HER REFUSAL TO UNDERGO A DRUG TEST, WHERE "REASONABLE SUSPICION" WAS BASED UPON UNLAWFULLY SEIZED EVIDENCE 21

A. Respondent's Search of Mrs. Hearn's Vehicle Was in Violation of the Board's "Drug-Free Workplace" Policy, Which Provided that Employee Vehicles Could Not be Searched Absent Consent or a Warrant Based Upon Probable Cause 22

B. The Search of Mrs. Hearn's Vehicle by Her

Employer Was in Violation of Her Fourth Amendment Rights, Where Respondent's "Drug-Free Workplace" Policy Afforded Mrs. Hearn a Reasonable Expectation of Privacy by Contractually Assuring Her that Employee Vehicles Would Not be Searched Absent Consent or a Warrant Based Upon Probable Cause 24

IV. CERTIORARI IS APPROPRIATE INSOFAR AS PETITIONER'S CASE PRESENTS THE IMPORTANT ISSUE WHETHER THE PROVISIONS OF RESPONDENT'S "DRUG FREE WORKPLACE" POLICY, REQUIRING PUBLIC SCHOOL EMPLOYEES TO UNDERGO URINALYSIS DRUG TESTING UPON "REASONABLE SUSPICION" AND DEFINING REASONABLE SUSPICION IN VAGUE, AMBIGUOUS AND OVERBROAD TERMS, COMPORTED WITH THE GUIDELINES SET FORTH BY THIS COURT IN *NATIONAL TREASURY EMPLOYEES' UNION V. VON RAAB*, 489 U.S. 656 (1989) AND *O'CONNOR V. ORTEGA*, 480 U.S. 709 (1987) 25

CONCLUSION. 28

TABLE OF AUTHORITIES

Cases

American Federation of Government Employees v. Derwinski, 777 F.Supp. 1493 (N.D. Cal. 1991) 18

American Fed'n of Gov't Employees v. Sullivan, 744 F.Supp. 294 (D.D.C. 1990) 17

Aubrey v. School Board of Lafayette Parish, 148 F.3d 559 (5th Cir. 1998) 17

B.C. v. Plumas Unified School Dist., 192 F.3d 1260 (9th Cir. 1999) 17

Bangert v. Hodel, 705 F.Supp. 643 (D.D.C. 1989) 18

California v. Acevedo, 500 U.S. 565 (1991) 20, 21

Camara v. Municipal Court, 387 U.S. 523 (1967) 22

Cardwell v. Lewis, 417 U.S. 583 (1974) 20

Carroll v. United States, 267 U.S. 132 (1925) 19, 20

Chambers v. Maroney, 399 U.S. 42 (1970) 20

Chandler v Miller, 520 U.S. 305 (1997) 19, 22

City of Indianapolis, et al. v. Edmond, 183 F.3d 659 (7th Cir. 1999) 17

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 20

Doe v. Refrow, 475 F.Supp. 1012 (N.Dist. Ind. 1979) 18

Florida v. Royer, 460 U.S. 491 (1983) 17, 18

Gardner v. Broderick, 392 U.S. 273 (1968) 21

Gossmeyer v. McDonald, 128 F.3d 481 (7th Cir. 1997) 23

Gouled v. United States, 255 U.S. 303 (1921) 28

Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989) 28

Hearn v. The Board of Education for the County of Chatham and the City of Savannah, 191 F.3d 1329 (11th Cir. 1999) ..... *passim*

Hearn v. The Board of Education for the County of Chatham and the City of Savannah, (unpublished) (U.S.D.C. S.Dist. Ga. 1998) ..... *passim*

Hoffa v. United States, 385 U.S. 293 (1966) 23

Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982) 19

Johnson v. United States, 333 U.S. 10 (1948) 17, 18

Merrett v. Moore, 58 F.3d 1547 (11th Cir. 1995) 15

Miranda v. Arizona, 384 U.S. 436 (1966) 8, 14

National Federation of Federal Employees v. Cheney, 742 F.Supp. 4 (D.D.C. 1990) 26, 27

National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990) 26, 27

National Treasury Employees' Union v. Von Raab, 489 U.S. 656 (1989) ..... -i-, 25

New Jersey v. T.L.O., 469 U.S. 325 (1985) 17

O'Connor v. Ortega, 480 U.S. 709 (1987) .... -i-, -ii-, 17, 22-25

Shelton v. Tucker, 364 U.S. 479 (1960) 21

Skinner v. Railway Labor Executives' Assoc, 489 U.S. 602 (1989) 22

Terry v. Ohio, 392 U.S. 1 (1968) 15, 17

United States v. Beale, 736 F.2d 1289 (9th Cir. 1984) 15

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 17

United States v. Dovali-Avila, 895 F.2d 206 (5th Cir. 1990) ... 15

United States v. Jacobsen, 466 U.S. 109 (1984) 18

United States v. Liberto, 660 F.Supp. 889 (D.D.C. 1987) . 15, 16

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 16

United States v. Mendenhall, 446 U.S. 554 (1980) 17

United States v. Place, 462 U.S. 696 (1983) 14-16, 24

United States v. Roach, No. 99 Cr. 6005 (S.D.Fla. Sept. 3, (1999) 12

United States v. Ross, 456 U.S. 798 (1982) 21

United States v. Santana, 427 U.S. 38 (1976) 18

United States v. Stone, 866 F.2d 359 (10th Cir. 1989) 15

United States v. Thomas, 757 F.2d 1359 (2nd Cir. 1985) . . 15, 16

Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) . -I-, 22

Warden v. Hayden, 387 U.S. 294 (1967) 17

Constitutional Provisions, Statutes and Regulations

United States Const., Fourth Amend. (1791) . . . . . *passim*

United States Const., Fourteenth Amend. (1868) 2

28 U.S.C. § 1254(1) (1999) 2

28 U.S.C. § 1331 13

28 U.S.C. § 1343(a)(3) 13

42 U.S.C. § 1983 2

Miscellaneous

Executive Order 12,546,51 Fed.Reg. 32889; 3 C.F.R.
Part 224 (1987) 26

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SHERRY HEARN respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in *Hearn v. The Board of Public Education for the City of Savannah and the County of Chatham*, filed on October 6, 1999 and reported at 191 F.3d 1329, affirming the decision of the United States District Court for the Southern District of Georgia granting summary judgment in favor of Respondent.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals (Marcus, C.J., Hill, Senior C.J., and Ferguson, U.S.D.J. sitting by designation) is published at 191 F.3d 1329. A copy is attached as Appendix A; the Judgment of the Eleventh Circuit is attached hereto as Appendix B. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, dated December 8, 1999, is unpublished. A copy is attached hereto as Appendix C. The Order Granting Motion for Summary Judgment and Denying Motion for Partial Summary Judgment and Dismissing Complaint, filed by the United States District Court for the Southern District of Georgia on February 25, 1998, is unpublished. A copy is attached hereto as Appendix D. The Judgment for Respondent filed in the District Court on February 26, 1998, is attached hereto as Appendix E.

JURISDICTION

The Petitioner seeks review by writ of certiorari from the Decision of the Eleventh Circuit Court of Appeals entered October 6, 1999, and Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, entered December 8, 1999. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1) (1999).

TEXT OF CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND REGULATIONS INVOLVED

UNITED STATES CONST., FOURTH AMEND. (1791):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONST., FOURTEENTH AMEND. (1868):

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. THE COURSE OF PROCEEDINGS

Petitioner filed a complaint in the United States District Court for the Southern District of Georgia (Savannah Division) on April 15, 1997, alleging deprivations of her Fourth, Fifth and Fourteenth Amendment rights under color of state law and seeking declaratory, injunctive and compensatory relief under 42 U.S.C. § 1983. D1. Cross-motions for summary judgment were filed by Petitioner and Respondent. On February 25, 1998, the court entered an order granting Respondent's motion for summary judgment, denying Petitioner's motion for partial summary judgment and dismissing the

complaint. *See* Appendix D. Judgment for Respondent was entered February 26, 1998. *See* Appendix E.

Petitioner timely filed notice of appeal to the United States Court of Appeals for the Eleventh Circuit on March 27, 1998. Record on Appeal ("R.A.") 26-1. On October 6, 1999, the appeals court affirmed the District Court's decision by a 2-1 decision, with Judge Ferguson (U.S.D.J., sitting by designation) dissenting. *See* Appendix A, A2. A petition for rehearing and suggestion for rehearing en banc, timely filed on October 26, 1999, was denied December 8, 1999. *See* Appendix C.

II. STATEMENT OF FACTS[1]

Respondent administers the public schools in Chatham County, Georgia, including Windsor Forest High School in Savannah. As of the 1995-96 academic year, Petitioner had been employed by Respondent as a teacher for twenty-seven years, the last twenty-four of those at Windsor Forest High School. 191 F.3d at 1336 (Ferguson, D.J., dissenting); A13. By all accounts, and as Respondent acknowledged, Petitioner was an outstanding and exemplary teacher, so much so that she had been named Chatham County "Teacher of the Year" for 1994.[2] Transcript of Personnel Action Hearing on April 30,

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[1] Insofar as Petitioner's case was before the Eleventh Circuit Court of Appeals on appeal from an order granting summary judgment for Respondent, the facts set forth herein are those facts which were uncontroverted by the parties below and accepted as not at issue by the District Court.

[2] At the termination hearing held before Respondent School Board on April 30, 1996, Chatham County School District Superintendent Patrick Russo testified that he recommended Mrs. Hearn's termination in spite of his recognition that she was "absolutely" an "excellent teacher" and that he had no question about her competence. (T-37) Windsor Forest Principal Linda Herman testified that Mrs. Hearn was "one of the best [teachers] I've ever seen," and that she had received nothing but superlative evaluations. (T- 150-51) Bernard Hirschberg, a former

1996, *BOE v. Sherry Hearn*, at 304; R.A. 12, 13 (Exhibit to Memorandum in Support of Motion for Summary Judgment). (Future references to the transcript of the school board hearing will be abbreviated as T-page number.) Her contract with Respondent, dated April 19, 1995, provided in pertinent part as follows:

> The employee agrees to observe such curriculum and standards and *obey such reasonable rules and regulations as may from time to time be put in force by appropriate lawful action* either of the employer or of the State Board of Education. The employee agrees, furthermore, to *execute and subscribe to such oath or affirmation of allegiance to the Government and Constitution, respectively, of the United States and of the State of Georgia* as may be required and permitted by law.
>
> ****
>
> This contract shall not be terminated by the employer except as provided for in any law of the State of Georgia presently in force or hereafter enacted pertaining to the retention and/or dismissal of employees of local boards of education.
>
> ****
>
> *The policies of the Board of Education* for the City of Savannah and the County of Chatham and the procedures developed by the Administration *are incorporated by reference herein* and made a part hereof and the employee agrees to abide by said policies and procedures.

191 F.3d at 1330-31; A2-A3, D2-D3; Plaintiff's Appendix of

Coordinator of Social Studies for Respondent, testified that she was a "top" teacher: "Of all the teachers ... if you had a rating of ten, she'd be 11." (T-207) Others who testified on her behalf included a Chatham County Commissioner, who was a former member of Respondent School Board. (T-215) (Testimony of Ben Price.) A petition for Mrs. Hearn's reinstatement, consisting of 246 signatures, mostly students, was presented to the Board at the hearing. (T-238)

Evidence, p. 1 (R.A. 20) (emphasis supplied).

Respondent admitted that it was not aware of any specific faculty drug problems at Windsor Forest High School prior to April 4, 1996, and had no specific knowledge of impairment of its teachers or any possession of drugs by any teachers on or before that date. [3]

On April 4, 1996, three of Respondent's campus police officers (Chief J.E. Franklin, Captain Ulysses Bryant and Corporal Howard Uhrig), assisted by canine handlers from the Chatham County Sheriff's Department, conducted an early morning "drug lockdown" and random search for drugs at Windsor Forest High School. 191 F.3d at 1331; A3, D2. The entire search was conducted under the direction of Chief Franklin. (T-29, 88-89) The canine unit was on hand to assist campus police in conducting the search. 191 F.3d at 1334; A9 (T-88-89).

Corporal Uhrig testified at length about the search at Mrs. Hearn's termination hearing before Respondent, held on April 30, 1996. He described how a high school search generally occurs. The campus police usually have a presearch meeting at the school's maintenance department, stay there for about half an hour, go to a staging area near the school and then, while everybody is meeting in the staging area, Chief Franklin or his designee goes to the school and orders the lockdown. (T-70)

On the date in question, teachers and students were taken out of classes during instructional time and required to wait in the halls until their respective classrooms were "cleared." (T-19) (Testimony of Deputy Michael J. Street). Testimony adduced at the termination hearing stated that the canine handlers and dogs stationed themselves

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[3] Superintendent Russo testified that he was not aware of any record of impairment of any teacher at Windsor Forest, or of any teachers taking drugs in to school. 191 F.3d at 1335; A11 (T-53-54). April 4, 1996 was the first incident in which drugs had been found in a teacher's vehicle. (T-66)

at the doors to classrooms while teachers and students exited, effectively allowing canine units to "sniff" individuals before screening the classrooms.[4] (T-245)

Corporal Uhrig then instructed Deputy Street to search the parking lot. 191 F.3d at 1334; A9 (T-27). The Board's written "Drug-Free Workplace Policy 766," incorporated by reference into Mrs. Hearn's employment contract, prohibited school authorities from searching an employee's automobile without first getting the employee's permission or obtaining a search warrant. 191 F.3d at 1332; A5. The policy permitted school authorities to detain the automobile (and the employee, if necessary) long enough to secure a warrant.[5] 191 F.3d at 1334; A10-11.

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[4] A. When they [campus police and canine units] come to the classroom, all the students have to leave the class, and they line us up and they use the – we have to empty everything out of our pockets, and then they use a metal detector to make sure that we don't have any weapons on us. And we are not present when they search through our things.

****

PRESIDENT MATTHEWS: Well, the drugs dogs are not used to sniff the students; is that correct?

A. They – they go by us. As we're walking out, they're waiting at the door.

Testimony of Windsor Forest student Tina Durhammer (T-245).

[5] Respondent's "Drug-Free Workplace" policy provided in pertinent part:

XVII. Investigations and Searches

Where a supervisor has reasonable suspicion that an employee has violated this policy, the Administration may search and inspect Board vehicles, lockers, work areas, desks, and other Board owned or controlled locations, property or receptacles, without prior notice to or presence of the employee .... *The*

When the police dog "alerted" on Petitioner's parked vehicle, Deputy Street permitted the dog to enter the vehicle through the open passenger side window, where it alerted on the closed ashtray compartment. 191 F.3d at 1331; A3. After Deputy Street got the dog out of the vehicle, he "notified Corporal Uhrig to check in the ashtray." *Id.*, D2 (T-23). Respondent's employee, Corporal Uhrig, opened the door to Mrs. Hearn's car. *Id.* Deputy Street pointed at the ashtray and told him, "It's in there." Respondent's employee, Corporal Uhrig, got in, opened the ashtray and removed what appeared to be a partially smoked, handrolled marijuana cigarette. 191 F.3d at 1331; A3, D2 (T-75, 92-93). He claimed to have tested the substance, put it into an evidence bag and put it into his notebook. D2 (T-94). He took Mrs. Hearn's faculty parking permit from the vehicle and went to report the finding to Principal Linda Herman. 191 F.3d at 1331; A3, D2 (T-78).

While her car was being searched, early in the school day, Mrs. Hearn was in her classroom, oblivious to the activity around her car until summoned to the parking lot. (T-121, 123, 320) Respondent admitted that the search of the interior of Mrs. Hearn's automobile that culminated in the removal of the marijuana cigarette took place without her permission and without a warrant. However, Mrs. Hearn testified, and Respondent acknowledged, that she would not have permitted a search of the interior of her car by police without a warrant or a further "sniff" of the interior by the canine unit. (T-

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> *Administration will search an employee's personal vehicles, personal clothing, purses, briefcases, employee-owned tool boxes and other personally owned bags, containers, or receptacles only with the employee's consent.* However, *any employee refusing to cooperate will be subject to* being reported to law enforcement officials, *detention of his/her property and/or person pending the issuance of a search warrant upon probable cause*, as well as discipline, up to and including discharge.

R.A. 20, Plaintiff's Appendix of Evidence in support of Motion for Partial Summary Judgment, at 3, p. 10 (emphasis supplied).

321, 333)

The school resource officer (a uniformed employee of Respondent assigned to Windsor Forest High School) returned to the car with Mrs. Hearn, at which time Corporal Uhrig asked her to open the trunk and asked Deputy Street (with his dog) to search the trunk. 191 F.3d at 1331; D3 (T-80). Corporal Uhrig told Captain Bryant and Chief Franklin what he had allegedly found in the ashtray compartment, and then went with Chief Franklin and Mrs. Hearn to the office of Mrs. Hearn's supervisor, Principal Linda Herman. D2-D3 (T-82). In Herman's office, with the principal, Chief Franklin and Captain Bryant present, Corporal Uhrig told Mrs. Hearn what had been found in her car and read her *Miranda* rights[6] to her. 191 F.3d at 1331; A3, D3 (T-98-100). Chief Franklin and Corporal Uhrig both informed her that she would probably be criminally charged with possession of marijuana. *Id.* (T-392). Mrs. Hearn asked Corporal Uhrig to see the evidence, but Corporal Uhrig told her the evidence had gotten "messed up" or "crumbled" during field testing. D3. Mrs. Hearn was never placed under arrest or criminally charged as a result of the incident. 191 F.3d at 1333; A9.

One explanation for this may lie in the anonymous report received by the Savannah-Chatham County Silent Witness line at 10:38 p.m. on the night of the search. A caller stated that a Windsor Forest student named "Ross" (last name unknown) had told him that "he planted the drugs in Ms. Snipes [sic] car and the other teacher Sherry Hearn." Although Respondent had notice of the report before Mrs. Hearn's termination hearing, it did not disclose it until discovery in the civil action. *See* R.A. 18, Exhibit "B" to Plaintiff's Statement of Facts pursuant to Local Rule 56.1, p. 9, para. 58.

Both Corporal Uhrig and Deputy Street acknowledged below that the entire operation was under the direction of Chief Franklin (T-88) and that the canine unit was there to assist the campus police

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[6] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

officers. (T-88-89) Deputy Street never spoke with Mrs. Hearn. (T-25) After the seizure of the alleged contraband by Respondent's employees, law enforcement officials distanced themselves from any further involvement in the case. *See* 191 F.3d at 1334; A10.

Respondent's Drug-Free Workplace Policy placed the determination whether to report the basis for "reasonable suspicion" of an employee in the hands of that employee's supervisor.[7] Respondent admitted below that Mrs. Hearn's supervisor, Principal Herman, did not believe Mrs. Hearn might have been under the influence of drugs or had illegal drugs in her system on the day in question. 191 F.3d at 1335; A11, D4. It further admitted Mrs. Herman was unaware of any instance in which Mrs. Hearn exhibited any of the specific characteristics enumerated by the drug policy as giving rise to "reasonable suspicion" on the day in question.[8] *Id.*

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[7] The policy provided:

Procedure for Requesting Reasonable Suspicion Testing

a. Administration will provide supervisory employees with training in: (1) recognizing drug and/or alcohol use; (2) the requirements of the Board Drug-Free Workplace Program; (3) the definition of "reasonable suspicion"; (4) procedures to document their observations; and (5) the procedure for requesting reasonable suspicion testing.

b. Supervisory employees observing conduct which they reasonably suspect may indicate violation of the Board's Drug-Free Workplace Policy will contact the Executive Director of Human Resources or designee.

191 F.3d at 1334; A11, D3-D4; R.A. 1, Complaint, Ex. "A", p. 5.

[8] Pursuant to the policy, these included, "*among other things*:"

c. ... significant performance decline, or otherwise unexplained significant attendance, work habit, behavior

When, pursuant to the policy,[9] Mrs. Herman telephoned the Respondent's office of the Executive Director of Human Resources to seek instructions, she was directed to order Mrs. Hearn to undergo urinalysis.[10] Pursuant to the Policy, which requires the Executive Director of Human Resources to "briefly summarize in writing the reasons for requesting a drug and/or alcohol test,"[11] the Director immediately transmitted a letter to Mrs. Hearn at Principal Herman's office summarizing the reasons for the Director's order to undergo testing. 191 F.3d at 1331; A4, D4. The letter made it clear that the order for testing was based upon the discovery of the alleged contraband, and not any other basis:

> or personality changes indicating possible violation of the Drug-Free Workplace Policy;
>
> d. involvement in a workplace, on-the-job or vehicular accident or incident, or any other actions which indicate a possible error in judgment or negligence which may be due to the presence of drugs or alcohol.

R.A. 1, Complaint, Exhibit "A", at 4.

[9] See n. 7, *supra*.

[10] On receipt of a report,

> The Executive Director of Human Resources or designee will evaluate the supervisor's and/or any other employee's information and determine whether to (1) require testing; (2) contact Campus Police or outside law enforcement authorities; (3) involve other Board administration; or (4) take other action. The Executive Director of Human Resources may require the supervisory employee to provide further documentation or require a Campus Police officer or other employee to observe the employee's conduct.

Policy XI.A.2.c, R.A. 1, Complaint, Exhibit "A", at 4-5.

[11] PolicyXI.A.2.d, R.A. 1, Complaint, Exhibit "A", at 5.

> I have been advised by Assistant Superintendent Frank Polakiewicz, that in the course of a drug search, *a substance was found in your personal vehicle* which you drove to work today. A field test of the substance *tested positive for cannabinoid.*
>
> *Based on this finding*, in compliance with BOE Policy 766 – Drug Free Workplace, you are hereby directed to submit to a drug test for reasonable suspicion within time requirements as outline in policy 766.
>
> Your failure to comply may result in disciplinary action.[12]

On principle, Mrs. Hearn, a teacher of social studies and the constitution, declined to take the test as instructed.[13] 191 F.3d at

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[12] *Id.* R.A. 1, Plaintiff's Appendix of Evidence, at 5 (emphasis supplied). Likewise, Principal Herman testified that she believed it was reasonable to ask Mrs. Hearn to undergo testing because contraband was allegedly found in her car. 191 F.3d at 1335; A11 (T-132-33).

[13] Mrs. Hearn's objection to the mass drug searches was well known to faculty and staff of Windsor Forest. Principal Herman testified:

> Q. Do you understand that her reason for declining the test was not for fear of what it would show, but because it violated her conscience and what she considered to be her Constitutional rights? Did she make –
> A. Yes.
> Q. – that pretty clear to you?
> A. Yes. She made that clear, very clear.
> Q. You don't have any doubts that those are sincerely held beliefs, do you?
> A. She has always said that.

(T-147-48) Mrs. Hearn herself testified:

> A. And so, I make it very clear, every time I have the opportunity, what my feeling is, what my view is, and what I

1331; A4, A12, D4. She had many questions regarding the propriety and constitutionality of the search, including why no one had asked her for consent to search her vehicle, as the drug policy required. *Id.* Mrs. Hearn also told Mrs. Herman that if she did submit to the test, she did not know how she could face her students after having consistently spoken out against the mass drug searches as an infringement on their constitutional rights and a disruption of the teaching process. 191 F.3d at 1336; A13. When Mrs. Hearn was unable to reach an attorney on the telephone (she was in court until late in the afternoon), she decided, after agonizing over the decision, to rely on her *Miranda* rights and not submit to the urinalysis test until after she was able to confer with her attorney. D4.

The following day, acting on the advice of one of her current attorneys, Mrs. Hearn submitted to a urinalysis test, which was administered by a commercial laboratory ordered by her own doctor. 191 F.3d at 1336; A13, D5. The clinical laboratory report of the test was negative for marijuana or any other prohibited substance. *Id.* Respondent admitted to its understanding prior to Mrs. Hearn's termination that Petitioner had been tested and that it had been informed the report was negative.[14] (T-42)

> genuinely believe to be a policy filled with opportunities and possibilities for abuse, for disregard of basic human rights, for mistreatment of both students, of faculty, employees, and of everyone else, from what I see as the beginning of a long line of steady encroachments erasing freedom in order to achieve security.

(T-314) Nonetheless, the record was equally clear that Mrs. Hearn was never insubordinate or disrespectful in expressing her views. (T-151) (Testimony of Principal Herman).

[14] The dissent observed:

> It is generally accepted scientific knowledge that active ingredients in marijuana, tetrahydrocannabonils (THC), are not flushed from the body in hours. THC is stored in fatty tissue and

Superintendent Russo immediately suspended Mrs. Hearn, and recommended that Respondent terminate her on the grounds of "insubordination" and "other good and sufficient cause" for failing to submit to the urinalysis test within two hours of being ordered to do so. 191 F.3d at 1331; A4. Although he acknowledged in testimony that the campus police and law enforcement officials had themselves violated Respondent's Drug-Free Workplace policy by searching Mrs. Hearn's car without her consent, and that he was aware of the negative test result, Dr. Russo stated that he recommended her termination because he felt that he was obliged to uphold the "integrity of the policy." 191 F.3d at 1335; A11 (T-38, 42). Nonetheless, he also reluctantly acknowledged that the policy merely permits, but does not require, an employee's termination under such circumstances. 191 F.3d at 1331; A3, n.2.

Following the April 30, 1996 hearing, Respondent upheld Superintendent Russo's recommendation for Mrs. Hearn's termination. 191 F.3d at 1331; A4. The Georgia State Board of Education affirmed Respondent's ruling. *Id.* Petitioner filed her complaint in the United States District Court for the Southern District of Georgia (Savannah Division) on April 15, 1997. Jurisdiction was vested in the District Court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS APPROPRIATE IN THIS CASE, WHERE A PUBLIC SCHOOL EMPLOYEE WAS TERMINATED ON THE BASIS OF ALLEGED

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can be detected by conventional laboratory testing for up to 30 days after ingestion for a casual user and can be found in the body of chronic users up to a year after last consumed. Testimony of Dr. Donald Roach, Analytical Biochemist, in *United States v. Roach*, No. 99 Cr. 6005 (S.D.Fla. Sept. 3, 1999).

191 F.3d at 1335, n. 1; A13.

CONTRABAND SEIZED DURING A MASS CAMPUS POLICE "DOG SNIFF" SEARCH OF THE SCHOOL PREMISES AND THE EMPLOYEE'S PARKED AND UNATTENDED VEHICLE, AND WHERE NO CLEAR RULE PERTAINS IN THE CIRCUIT COURTS REGARDING THE CONSTITUTIONALITY OF SUCH SEARCHES

A. No Clear Rule Pertains in the Circuit Courts Whether a Canine "Sniff" of a Public Workplace and of the Exterior and Interior of an Employee's Parked Vehicle Constitutes a "Search" Under the Fourth Amendment.

Respondent, through its employees, three campus police officers, engaged in a school-wide, suspicionless mass dog sniff search of classrooms, students, teachers, and their personal property located on the premises, including personal vehicles.[15] Teachers and students were ordered out of the classrooms during instructional time and forced to wait in hallways while police canine units and campus police officers "cleared" each respective classroom and its contents (including personal items) of the presence of contraband.

From the classrooms, the canine police units and campus police moved to the parking lots, "sniffing" staff and student vehicles for contraband on an indiscriminate, suspicionless basis. A dog "alert" led authorities to suspect the presence of marijuana in Petitioner's open and unlocked automobile.[16] At all times following the dog sniff, the campus police, acting as full-time employees of the Respondent, took exclusive control of the matter. They opened the car door, opened the ashtray, removed a partially smoked cigarette, field

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[15] Employees of Respondent testified that the mass canine searches were performed at Windsor Forest several times per year. (T-36)

[16] Petitioner testified that the front passenger window of her vehicle could not be closed because the mechanism was broken. (T-236)

tested it, summoned Mrs. Hearn from her classroom, escorted her to the principal's office, read her *Miranda* rights to her and went to the off-campus laboratory where school authorities had ordered her to be tested.

The subjection of persons and property to suspicionless canine searches is of highly doubtful constitutional validity. The Supreme Court has addressed the constitutionality of canine sniff searches only once, nearly twenty years ago, in *United States v. Place*, 462 U.S. 696 (1983), and then only in *dictum*. *Place* involved an individualized sniff of an air traveler's luggage, which was seized and held for ninety minutes. 462 U.S. at 699. In holding that the detention unreasonably exceeded the scope of a permissible stop under *Terry v. Ohio*, 392 U.S. 1 (1968), the Court suggested in an aside that the canine sniff of the defendant's luggage was so limited in nature that it could not be deemed a "search" for Fourth Amendment purposes. 462 U.S. at 707. Three members of the Court objected to the inclusion of this view by the majority on the ground that the issue had not been briefed or argued. *Id.*

Since *Place*, the Court has not readdressed this issue, nor applied or extended the dictum of *Place* beyond canine sniffs of luggage at airports based on individualized suspicion. The circuit courts of appeal, however, have struggled with the nature of canine sniffs in a variety of other contexts. *Compare United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985), *cert. den.*, 474 U.S. 819 (1985) (canine sniffs are searches, requiring balancing against legitimate expectation of privacy); *United States v. Liberto*, 660 F.Supp. 889 (D.D.C. 1987), *aff'd without op.*, 838 F.2d 571 (D.C. Cir. 1988) (dog sniff is a "search" but presumptively reasonable); with *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995) (narrowly applying *Place* dictum to permit vehicle roadblocks established for the separate lawful purpose of checking driver's licenses and registrations could include canine sniffs of exterior of stopped vehicles); *United States v. Dovali-Avila*, 895 F.2d 206 (5th Cir. 1990) (canine sniffs are not searches); *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989) (same); *United States v. Beale*, 736 F.2d 1289 (9th Cir. 1984) (same).

The Eleventh Circuit squarely rejected Petitioner's claim that the Fourth Amendment was implicated by the suspicionless sniff search on the premises of her workplace, holding that "[a] dog sniff of a person's property located in a public place is not a search within the meaning of the Fourth Amendment." 191 F.3d at 1332; A6. The court relied upon the Eleventh Circuit's earlier adherence to that view in *Merrett v. Moore*, 58 F.3d at 1553 n. 11, in which it held that "[t]he use of dogs on the exterior of ... cars constitutes no search." The Fifth, Ninth and Tenth Circuits have held likewise. *See* cases cited *supra*. However, the Second Circuit and the District of Columbia Circuit have held to the contrary, that dog sniffs are "searches." *See* cases cited *supra*. The Second Circuit has refused to expand the *Place* dictum to sniffs on private property, holding that the defendants possessed a reasonable expectation of privacy in their closed residence that was violated by the warrantless sniff search. 757 F.2d at 1366-67. In the D.C. Circuit, a warrantless sniff of a train passenger compartment was subjected to a Fourth Amendment balancing analysis, and the search upheld in view of the passenger's conduct that did not evidence an expectation of privacy in the compartment. *Liberto*, 660 F.Supp. at 891.

The split in authority between the Second and D.C. Circuits, and the Eleventh and several other circuits, over the Fourth Amendment status of dog sniff searches warrants a revisitation by the Court of the *Place* dictum and its application to situations outside the limited context of airports and public transportation.

B. No Clear Rule Pertains in the Circuit Courts Whether a Canine "Sniff" of a Public Workplace and of the Exterior and Interior of an Employee's Parked Vehicle Is A Reasonable Search Under the Fourth Amendment Absent "Reasonable Suspicion" or "Special Need."

The importance of the issues related to Respondent's sniff searches is heightened by the factual context in which it is presented, suspicionless searches not of a "public place" in the usual sense, but

of Petitioner's workplace, a public school, which is not open to the public generally, and which should have afforded Mrs. Hearn and her co-workers and students a much greater expectation of privacy than arises in a street or park. The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). This Court has stressed that "public employer intrusions on the constitutionally protected privacy of government employees ... should be judged by the standard of reasonableness under all the circumstances." *O'Connor v. Ortega*, 480 U.S. 709, 725-726 (1987). This standard requires a two-part inquiry: 1) Whether the search was "justified at its inception based upon reasonable, individualized grounds for suspecting the search will turn up evidence of misconduct," 480 U.S. at 726, citing *Terry v. Ohio*, 392 U.S. at 20; and 2) Whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place," 480 U.S. at 726, citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Petitioner contends that the mass searches conducted in this case were unreasonable both at inception and in the scope of their interference with the educational function of Windsor Forest High School and the right of privacy of the faculty and students there.

The actions of Respondents' employees, validated by the Court of Appeals, raise the specter of wholesale police campaigns involving mass school and workplace sniffs by canine units and seizures of persons, personal property such as vehicles, and the contents therein, without warrants or individualized suspicion. Unlike the situation presented in *City of Indianapolis, et al. v. Edmond*, 183 F.3d 659 (7th Cir. 1999), *cert. granted*, Sup.Ct. No. 99-1030 (February 22, 2000), Respondent may not purport to rely on an interest in traffic safety or law enforcement; its sole interest was to monitor compliance with workplace regulations.

The Eleventh Circuit's split decision flouts the central rule of *Terry* stop jurisprudence, that "[t]he scope of the search must be

'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Mendenhall*, 446 U.S. 554 (1980); *Florida v. Royer*, 460 U.S. 491, 500 (1983). "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." 392 U.S. at 28. The investigative methods employed pursuant to a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. In reviewing police conduct in this area, the burden is upon the State to demonstrate the reasonableness of the scope and duration of the search in relation to its legitimate purpose. 460 U.S. at 500.[17]

The circuit courts that have considered the question of the constitutionality of suspicionless dog sniff searches in public schools have taken various views. The Eleventh Circuit's conclusion in Petitioner's case that the suspicionless sniff of the school parking lot was not a "search" is akin to the Seventh Circuit's holding that a dog

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[17] This view is consistent with general Fourth Amendment safeguards laid down by the Court in other contexts. Even a search incident to a lawful arrest must be limited in scope to that which is justified by the purposes served by that exception to the warrant requirement. *Florida v. Royer*, 460 U.S. 498. Likewise, the "hot pursuit" exception to the warrant requirement permits the warrant requirement to be abandoned in the context of probable cause to arrest a fleeing suspect, but not reasonable suspicion to interrogate. *Johnson v. United States*, 333 U.S. 10 (1948). In Justice Brennan's words, the Eleventh Circuit's reading of *Place* would permit "law enforcement officers [to] release a trained cocaine-sensitive dog ... to roam the streets at random, alerting the officers to people carrying cocaine." *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting). The searches conducted by Respondent's police employees are characteristic of "an extended hue and cry in and about [the] public streets" created by police, which the Supreme Court has condemned where no warrant or probable cause exists. *United States v. Santana*, 427 U.S. 38, 43 (1976).

sniff of a student's person was not a "search." *Doe v. Refrow*, 475 F.Supp. 1012 (N.Dist. Ind. 1979), *op. adopted on this issue and rev'd on other grounds*, 631 F.2d 91 (7th Cir.) (per curiam), *cert. denied*, 451 U.S. 1022 (1981). This *per se* view is to be contrasted with the Ninth Circuit's recent determination that a suspicionless dog sniff search of the student body of a public school constituted a Fourth Amendment "search," and that such a search was "unreasonable" because, in the absence of a record of a drug problem or crisis at the school, the government's important interest in deterring student drug use would not have been placed in jeopardy by requiring individualized suspicion. *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1268 (9th Cir. 1999), citing *Chandler v. Miller*, 520 U.S. 305, 314 (1997). Similarly, the Fifth Circuit held in *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982), that a school policy of drug dog sniffs of students was an unconstitutional "search" absent individualized suspicion, but that the sniffing of vehicles and lockers was not a "search" under the Fourth Amendment.

In view of the inconsistent Fourth Amendment treatment of suspicionless dog sniff searches of school premises and persons thereon, and particularly given the context of the instant case, which involves an adult teacher employee, rather than a student, certiorari is appropriate to clarify whether and under what circumstances students and school personnel may be subjected to such searches.

II. CERTIORARI IS APPROPRIATE WHERE THE ELEVENTH CIRCUIT HAS ENGAGED IN AN UNPRECEDENTED AND DANGEROUS EXTENSION OF THE SO-CALLED "AUTOMOBILE EXCEPTION" TO THE WARRANT REQUIREMENT TO PERMIT A PUBLIC EMPLOYER TO SEIZE CONTRABAND FROM A CLOSED COMPARTMENT IN AN EMPLOYEE'S PARKED AND UNATTENDED VEHICLE, ON THE PRETEXT OF ENFORCING THE WORKPLACE "ZERO TOLERANCE" DRUG POLICY

The Eleventh Circuit's decision conflicts with the rule for

warrantless searches of automobiles enunciated by this Court in the landmark case of *Carroll v. United States*, 267 U.S. 132 (1925), which requires the existence of *exigent circumstances* to justify the warrantless search of a vehicle. The appeals court upheld a warrantless search of Mrs. Hearn's parked, unattended vehicle on the parking lot of a government employer, where the employee/owner of the vehicle could not be expected to depart the premises for several hours (indeed, who was unaware that the search was even taking place), and where ample time and opportunity existed to obtain a warrant and to search the vehicle. Since Mrs. Hearn was required to be on the property for the remainder of the work day, there was no substantial burden on the Respondent to either post a watch on the car or impound it while its employees obtained a warrant to search the interior; in fact, its "Drug-Free Workplace" policy *required* it to do so. By simply declaring that the search of Mrs. Hearn's vehicle was "justified by the automobile exception to the general requirement for a warrant," 191 F.3d 1333; A7, the Court of Appeals' ruling effectively eliminates the exigent circumstances requirement of *Carroll*, which requires courts to analyze the specific facts and circumstances which allegedly justify the warrantless search.

The "exigent circumstances" rationale of *Carroll* survives the Court's holding in *California v. Acevedo*, 500 U.S. 565 (1991). *Acevedo* merely clarified *Carroll* "as providing one rule to govern all automobile searches," that is, that "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." 500 U.S. at 580. Nonetheless, *Acevedo* did not undercut the rationale of *Carroll*, that in the case of automobiles "it is not practicable to secure a warrant because the vehicle can be moved quickly out of the locality or jurisdiction in which the warrant must be sought." 267 U.S. at 153; *Acevedo*, 500 U.S. at 569 ("[the Court] therefore held [in *Carroll*] that a warrantless search of an automobile, based upon probable cause ... *in the light of an exigency arising out of the likely disappearance of the vehicle*, did not contravene the Warrant Clause....") (emphasis added). The exigent circumstances rationale of *Carroll* has been consistently stressed by the Court. *See, e.g., Chambers v. Maroney*, 399 U.S. 42

(1970) (existence of exigent circumstances to be determined at the time automobile is seized); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (no exigent circumstances pertained where vehicle was parked on defendant's private driveway and police had known of its location there); *Cardwell v. Lewis*, 417 U.S. 583 (1974) (citing exigent circumstances justifying impoundment of suspect's vehicle and distinguishing *Coolidge*). Likewise, the Court in *Acevedo* took pains to note, "Our holding today neither extends the *Carroll* doctrine nor broadens the scope of the permissible automobile search delineated in *Carroll, Chambers*, and *[United States v.] Ross* [456 U.S. 798 (1982)]." 500 U.S. at 580.

Nonetheless, the Eleventh Circuit clearly read *Acevedo* to dispense with the warrant requirement whenever an automobile is searched. The court of appeals' determination constitutes an unwarranted extension of the rule of *Carroll* and *Acevedo*, and certiorari is appropriate to redress the court's error.

III. CERTIORARI IS APPROPRIATE INSOFAR AS PETITIONER'S CASE PRESENTS THE IMPORTANT ISSUE WHETHER A PUBLIC EMPLOYER MAY TERMINATE A TENURED EMPLOYEE BASED UPON HER REFUSAL TO UNDERGO A DRUG TEST, WHERE "REASONABLE SUSPICION" WAS BASED UPON UNLAWFULLY SEIZED EVIDENCE

The Eleventh Circuit agreed with Respondent's contention that Mrs. Hearn was not fired for the presence of marijuana allegedly found in her automobile, but "for insubordination - her refusal to take the drug test within the prescribed two hour period." 191 F.3d at 1331; A4. The appeals court's conclusion constitutes serious constitutional error that begs for redress. The actions taken against Mrs. Hearn by her employer, though cloaked in the aegis of the law enforcement authority of Respondent's employees, were not taken to enforce the criminal law, but to monitor compliance with the "Drug-Free Workplace" regulations incorporated into its government employment contract. 191 F.3d at 1333-34 (Ferguson, D.J.,

dissenting); A9. Second, it is indisputable that an unconstitutional governmental policy or regulation is illegitimate and may not be enforced against a citizen. *See, e.g., Shelton v. Tucker*, 364 U.S. 479 (1960) (public school teachers could not be denied rehire for refusing to comply with requirement that they disclose organizational affiliations); *Gardner v. Broderick*, 392 U.S. 273 (1968) (police department could not terminate officer for claiming Fifth Amendment right against self-incrimination). In this case, Respondent obtained the alleged "evidence" that was the only basis for the finding of "reasonable suspicion" under the Drug-Free Workplace Policy in violation of the Fourth Amendment and of Mrs. Hearn's contract of employment. Further, there was no corroborating evidence below that the alleged contraband ever existed, or that if it did, that it belonged to Mrs. Hearn. There *was* evidence, however, that it was planted by an unknown third party. Mrs. Hearn's refusal to accede to the illegitimate demand for a drug test could not therefore serve as the ground for her termination.

A. Respondent's Search of Mrs. Hearn's Vehicle Was in Violation of the Board's "Drug-Free Workplace" Policy, Which Provided that Employee Vehicles Could Not be Searched Absent Consent or a Warrant Based Upon Probable Cause.

"Searches and seizures by government employers or supervisors of the private property of their employees ... are subject to the restraints of the Fourth Amendment." *O'Connor*, 480 U.S. at 715. The record below was clear that there was absolutely no history of drug abuse or possession by the faculty and staff of Windsor Forest High School. In the absence of such a history, Respondent lacked any basis for imposing a suspicionless drug testing requirement upon Mrs. Hearn and her co-workers. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 661-63 (1995) (emphasizing history of drug abuse problems by students and "role model" effect of randomly tested student athletes in upholding suspicionless testing); *Chandler v Miller*, 520 U.S. 305 (1997); *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998). None of the criteria sanctioned by the Court as

justifying random searches were present. The teachers were not "safety-sensitive employees," *see Skinner v. Railway Labor Executives' Assoc*, 489 U.S. 602 (1989). *Cf. Aubrey*, 148 F.3d at 564 (school janitor could be deemed a "safety sensitive" employee because he worked with dangerous substances and machinery). Nor did any "special needs" exist that made the warrant and probable cause requirement of the Fourth Amendment impracticable. *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967); *Chandler, supra*. A workplace drug test, like a workplace search, is justified at its inception only if there are *reasonable grounds* to believe the search will uncover evidence that the employee is engaged in misconduct. *O'Connor v. Ortega*, 480 U.S. 709; *Gossmeyer v. McDonald*, 128 F.3d 481, 490-92 (7th Cir. 1997). For this reason, the District Court appropriately noted that Respondent's policy "was designed to conform to constitutional standards...." D3, n. 1. Constitutionally, Respondent's policy could only impose on Petitioner an obligation to undergo a drug test based on a *reasonable* individualized suspicion of her. The Eleventh Circuit erroneously held that an individualized suspicion based upon a search that was in violation of Respondent's own drug policy was "reasonable."

Chief among the constitutional safeguards the policy sought to afford was a protection against warrantless, nonconsensual searches of employee personal effects and vehicles.[18] The policy carefully "distinguishe[d] between the search of Board-owned property and employee-owned property, the latter of which require[d] the employee's consent prior to any search." D4, n. 1. An employee

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[18] The parking lot of Windsor Forest High School was clearly part of Mrs. Hearn's "workplace" subject to Fourth Amendment protection, since "[t]he workplace includes those areas and items that are related to work and are *generally within the employer's control*." *O'Connor v. Ortega*, 480 U.S. at 715 (emphasis supplied); *see Hoffa v. United States*, 385 U.S. 293, 301 (1966) ("What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room *or his automobile*.") (Emphasis supplied.)

refusing consent was subject to being detained by her employer, along with her personal property, "pending the issuance of a search warrant *upon probable cause*...." Thus, by its terms, Respondent's policy purported to protect Mrs. Hearn from a search of her vehicle on mere reasonable suspicion. This protection was ignored, and Mrs. Hearn's employment contract breached, when Respondent's employee, Officer Uhrig, entered and searched Mrs. Hearn's vehicle without a warrant and without her consent, in spite of the presence of her faculty parking permit in plain view on the dashboard. When the Eleventh Circuit held that this workplace search was "reasonable," it strained the meaning of the term beyond any Fourth Amendment utility. Certiorari should be granted in this case to redress the appeals court's egregiously expansive reading of the "reasonableness" requirement of *O'Connor v. Ortega* to justify individualized suspicion procured through illegitimate means.

B. The Search of Mrs. Hearn's Vehicle by Her Employer Was in Violation of Her Fourth Amendment Rights, Where Respondent's "Drug-Free Workplace" Policy Afforded Mrs. Hearn a Reasonable Expectation of Privacy by Contractually Assuring Her that Employee Vehicles Would Not be Searched Absent Consent or a Warrant Based Upon Probable Cause.

In *O'Connor v. Ortega*, the Court held that the "reasonablesness" of a search conducted in a government workplace depends upon "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." 480 U.S. at 719, quoting *United States v. Place, supra*, 462 U.S. at 703. In assessing the level of the intrusion in that case, the Court relied in part on the absence of evidence "that the [employer] had established any reasonable regulation or policy discouraging employees ... from storing personal papers and effects in their desks or file cabinets, although the absence of such a policy does not create an expectation of privacy where it would not otherwise exist." 480 U.S. at 719

[citations omitted]; *see also* 480 U.S. at 738 (Blackmun, J., dissenting) ("courts have decided that an employee had no such expectation [of privacy] with respect to a workplace search because an established regulation permitted the search."). *A fortiori*, the existence of the workplace policy in Petitioner's case heightened Mrs. Hearn's reasonable expectation of privacy in her automobile.

Conversely, a government employer's interest in conducting a search receives significantly reduced constitutional consideration where, as here, the search was not in the nature of the type of "administrative" employer search sanctioned by the Court in *O'Connor v. Ortega*, but rather was clearly a "search for evidence of criminal misconduct." 480 U.S. at 721. In fact, the Court noted in that case, "The only cases that imply that a warrant should be required involve searches that are not work related ... *or searches for evidence of criminal misconduct*." 480 U.S. at 721 [citations omitted]. Unlike the employer in *O'Connor*, Respondent in this case was not "focused primarily on the need to complete [its] work in a prompt and efficient manner" or to "safeguard or identify state property ... in connection with a pending investigation;" to the contrary, it had engaged *its own police force* to "conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings." *Id.* Where a public employer employs full-fledged police officers for the express purpose of searching out and seizing illegal drugs in the workplace, the Fourth Amendment should be read to afford government employees the protections of a warrant and probable cause.

IV. CERTIORARI IS APPROPRIATE INSOFAR AS PETITIONER'S CASE PRESENTS THE IMPORTANT ISSUE WHETHER THE PROVISIONS OF RESPONDENT'S "DRUG FREE WORKPLACE" POLICY, REQUIRING PUBLIC SCHOOL EMPLOYEES TO UNDERGO URINALYSIS DRUG TESTING UPON "REASONABLE SUSPICION" AND DEFINING REASONABLE SUSPICION IN VAGUE, AMBIGUOUS AND OVERBROAD TERMS, COMPORTED WITH THE

GUIDELINES SET FORTH BY THIS COURT IN *NATIONAL TREASURY EMPLOYEES' UNION V. VON RAAB*, 489 U.S. 656 (1989) AND *O'CONNOR V. ORTEGA*, 480 U.S. 709 (1987)

Respondent's "Drug-Free Workplace Policy" defined "reasonable suspicion" in a manner that did not restrict the predicate factors to objective, verifiable criteria. Respondent's policy bears a striking resemblance to numerous federal drug-free workplace policies issued under the auspices of a Reagan administration executive order,[19] which have been held to define reasonable suspicion in unconstitutionally vague and overbroad terms.[20] *See, e.g., National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 972-73 (D.C. Cir. 1990) (Dept. of Agriculture); *Bangert v. Hodel*, 705 F.Supp. 643, 650 (D.D.C. 1989) (Dept. of the Interior); *American Fed'n of Gov't Employees v. Sullivan*, 744 F.Supp. 294, 302-303 (D.D.C. 1990) (Dept. of Health and Human Services); *National Federation of Federal Employees v. Cheney*, 742 F.Supp. 4, 6 (D.D.C. 1990) (Defense Mapping Agency).[21]

The catchall clause in Respondent's policy allowing it to find reasonable suspicion based upon listed factors, "*among other things*," upon which Respondent apparently relied in requiring Petitioner to undergo testing,[22] was summarily rejected in *Hodel*. 705 F.Supp. at

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[19] Executive Order 12,546, 51 Fed. Reg. 32889-32893; 3 C.F.R. Part 224 (1987).

[20] The federal agencies' regulations state that "[r]easonable suspicion" may be based on, "among other things," "Observable phenomena," or "a pattern of abnormal conduct or erratic behavior." *See generally* cases *infra*.

[21] The United States Attorney declined to appeal these rulings further.

[22] *See* policy provisions set out in n. 8, *supra*. Although the particular provision on which Respondent relied to require the drug test

651 (holding government's only legitimate interest is in on-duty drug use or drug-related job impairment supported by evidence of specific, personal observations concerning performance, appearance, behavior, etc.). Likewise, the criterion, "otherwise unexplained significant attendance, work habit, behavior, or personality changes," is similar to the federal criterion of "pattern of abnormal conduct or erratic behavior" that has held overbroad. *American Federation of Government Employees v. Derwinski*, 777 F.Supp. 1493, 1501 (N.D. Cal. 1991). In striking down that standard as "both unduly overbroad and ambiguous," the court in *American Fed'n of Gov't Employees v. Sullivan*, *supra*, stated:

> It is unclear, for example, how this standard would be applied to employees who did not exhibit "the physical symptoms of being under the influence of a drug," as required by the first [federal] criterion. Certainly, "the pattern of abnormal conduct or erratic behavior" must be the kind of erratic behavior that could be induced by drugs in order to justify a urinalysis test; otherwise, there would be no reasonable suspicion that the behavior was induced by drug use .... Yet, even with these precautions, it appears that there is likely to be a risk of error in evaluating who should be tested under this relatively subjective criterion than in use of the far more objective criterion which calls for testing based on direct observation of the physical symptoms of drug use.

744 F.Supp. at 304.

A balance is required to be struck between the government employer's intrusion on Fourth Amendment interests and its

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was not specified, it is reasonable to assume that it was this catchall provision, insofar as Respondent acknowledged that Mrs. Hearn at no time before or on April 4, 1996, exhibited any subjective behavior indicative of potential drug use under the Drug-Free Workplace Policy, and that she was ordered to undergo a urinalysis drug test solely on the basis of the alleged finding of contraband in her vehicle.

promotion of legitimate interests. *Yeutter, supra*, 918 F.2d at 973. An employer's interest in drug testing extends no further than its interest in workplace conduct and performance of work responsibilities. 918 F.2d at 974. Criterion that do not seek to establish "reasonable, articulable, and individualized suspicion of *on-duty* drug use or impairment" are unconstitutional. 918 F.2d at 977 [emphasis supplied].

While the government's interest in assuring the integrity of its work force is important, and particularly in the public schools, it is equally important that testing criteria be narrowly tailored so as not to subject employees to unwarranted and unnecessary infringements of their Fourth Amendment rights. *National Fed'n of Federal Employees v. Cheney, supra*, 742 F.Supp. at 7. Criteria relating to a pattern of abnormal or erratic behavior might have nothing to do with drug abuse, but rather may be a catalog of symptoms of poor work habits, bad attitudes or even bad luck. 742 F.Supp. at 8.

Respondent bore the burden of sifting through the overbroad and excessively vague criteria in its "Drug-Free Workplace Policy" and establishing which of them might survive scrutiny. 742 F.Supp. at 9, citing *Harmon v. Thornburgh*, 878 F.2d 484, 491, n. 10 (D.C. Cir. 1989). In formulating criteria which can trigger a urinalysis test, Respondent was required to articulate a specific compelling interest in policing off-duty drug usage which could impact an employee's on-the-job performance before its interests could be weighed against Petitioner's right to privacy. *Sullivan*, 744 F.Supp. at 303. This it failed to do. The failure of the district and appellate courts to engage in anything more than a cursory analysis of Petitioner's facial challenge to the policy constitutes serious error on which certiorari should be granted.

CONCLUSION

The Supreme Court has "repeatedly decided that [the Fourth Amendment] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights

secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 303, 304 (1921). Petitioner Sherry Hearn suggests that the instant case is one such example of abuses of the constitutional rights of government employees. She respectfully requests that her Petition be granted, and that certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review its decision in *Hearn v. The Board of Education*, and that this Honorable Court decide the issues raised herein.

Respectfully submitted,

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March 3, 2000

TABLE OF CONTENTS TO APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Decision in *Hearn v. the Board of Public Education*, No. 98-8390, U.S.C.A. 11th Cir. (191 F.3d 1329) .. A1-A14

Judgment in *Hearn v. the Board of Public Education*, No. 98-8390, U.S.C.A. 11th Cir. (191 F.3d 1329) ... B1-B2

Order Denying Petition for Rehearing and Suggestion of Rehearing En Banc in *Hearn v. the Board of Public Education*, No. 98-8390, U.S.C.A. 11th Cir. (191 F.3d 1329) C1-C2

Order in *Hearn v. the Board of Public Education for the City of Savannah and the County of Chatham*, Civ. No. CV 497-88, U.S.D.C. Southern Dist. Ga. (Savannah Div.) D1-D23

Judgment in *Hearn v. the Board of Public Education for the City of Savannah and the County of Chatham*, Civ. No. CV 497-88, U.S.D.C. Southern Dist. Ga. (Savannah Div.) E1

Sherry HEARN, Plaintiff- Appellant, v. The BOARD OF PUBLIC EDUCATION, Defendant-Appellee

No. 98-8390

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

191 F.3d 1329

October 6, 1999, Decided

COUNSEL:

ATTORNEY(S) FOR APPELLANT(S): Aaron L. Buchsbaum, Alan Stewart Lowe, Buchsbaum & Lowe, Savannah, GA. PAUL WAIN PAINTER, JR., Ellis, Painter, Ratterree & Bart LLP, Savannah, GA.

AMICUS BRIEF FILED ON BEHALF OF APPELLANT: Michael E. Kramer, Kramer & Thomas, LLC, Atlanta, GA.

ATTORNEY(S) FOR APPELLEE(S): Leamon Roy Holliday, III, ROY E. PAUL, Bouhan, Williams & Levy, Savannah, GA.

JUDGES:

Before MARCUS, Circuit Judge, HILL, Senior Circuit Judge, and FERGUSON*, District Judge. FERGUSON, District Judge, dissenting.

* Honorable Wilkie D. Ferguson, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

OPINION BY: HILL

OPINION: [*1330] HILL, Senior Circuit Judge:

Sherry Hearn was terminated from her position as a high school teacher for refusing to take a drug test after marijuana was allegedly found in her car in the school's parking lot. She sued defendants alleging, among other things, denial of her substantive and procedural due process rights, intentional breach of contract, violations of the Fourth and Fifth Amendments. She sought damages as well as reinstatement. The district court granted summary judgment for defendants on all claims and Hearn brought this appeal. For the following reasons, we affirm.

I.

Sherry Hearn was a teacher in Savannah for many years. She was employed under a contract which required that she abide by the policies of the Board of Education of Chatham County (Board).

In 1992, the county enacted its "Safe School Plan" which called for "zero-tolerance" of drugs, alcohol and weapons. In 1993, the Board promulgated a "Drug-Free Workplace Policy" (DFWP) governing its employees. The policy is intended to "deter users and abusers of alcohol, drugs and other controlled substances." [*1331] It provides for drug testing of any employee when "supervisor observations or other objective circumstances reasonably support a suspicion that an employee may have violated the Board drug and alcohol policy." n1 The policy further requires that such testing be conducted within two hours of the incident which generates the "reasonable suspicion." An employee's refusal to consent to the drug test, or to a search of her personal property located at the school is cause for termination. n2 Finally, "any employee who tests positive ... [for] alcohol, drugs or other controlled substances will be terminated."

----------Footnotes----------

n1 This policy lists a variety of circumstances which cause reasonable suspicion to arise. Although the circumstances of this case

are not specified, the list is not exhaustive.

n2 The policy provides that "the School System will discipline employees in its sole discretion, up to and including immediate discharge ... for any violation of this policy, including ... (2) refusing to submit to testing; (3) refusing to execute a release/consent form; (4) failing to cooperate with an investigation or search."

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

In April of 1996, campus and Chatham County, Georgia police conducted a "drug lockdown" and random drug search at Hearn's high school in Savannah. Hearn's car was in the school's rear parking lot, unlocked and with its passenger side window down.

The Chatham County deputy's drug-sniffing dog alerted at Hearn's vehicle. The deputy let the dog enter the car through the passenger window. The dog alerted on the vehicle's closed ashtray. A campus officer opened it and found a partially burned, hand-rolled cigarette. He testified that he field-tested it for marijuana, and it tested positive. n3 The officers noticed the faculty parking permit on the dash and took it with them.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n3 The positive finding was later confirmed by the Crime Lab.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

The officers went to the school's principal, Linda Herman, and informed her of these events. She summoned Hearn, who denied knowledge or possession of any marijuana. One of the County's officers "Mirandized" Hearn, telling her that she probably would be charged with criminal possession of marijuana.

Herman informed Hearn that, under the DFWP, she must take a urinalysis drug test within two hours. Hearn refused. Herman gave

Hearn a warning letter which directed her to take the drug test. The letter stated:

> In the course of a drug search, a substance [found to have tested positive for cannabinoid] was found in your personal vehicle.... Based on this finding, in compliance with BOE Policy 766--Drug Free Workplace, you are hereby directed to submit to a drug test for reasonable suspicion within [the two-hour limit]. Your failure to comply may result in disciplinary action.

Hearn, however, continued to refuse to take the drug test.

Later, the Superintendent of Schools for Chatham County suspended her. n4 He recommended that she be terminated for "insubordination" and "other good and sufficient cause" as the result of her failure to consent to take the drug test within the prescribed two hour period.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 Hearn did take the drug test the following day on her attorney's advice. The result at that time was negative.

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The Board provided Hearn with a hearing. She appeared with counsel and testified. At the end of the hearing, the Board made no findings of fact, but voted to accept the superintendent's recommendation and terminated Hearn. Hearn appealed to the State Board of Education, which issued a written opinion upholding the Board.

II.

Hearn's termination was for insubordination--her refusal to take the drug test within the prescribed two hour period. She argues that she cannot be terminated for her refusal because she was under no

[*1332] obligation to take the drug test. She was not obliged to take the test because there was no "reasonable suspicion" as required by the Board's policy prior to directing an employee to take the test. There was no reasonable suspicion because the search of her car was illegal under both the Board's own policy which requires an employee's consent or a search warrant in order to search an employee's personal property at school, and under the Fourth Amendment. We find no merit in either of these contentions. n5

----------Footnotes----------

n5 To the extent that these contentions also raise property-interest based procedural and substantive due process claims, they are barred by *McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994)* (failure to show absence of an adequate state remedy is an absolute bar to federal relief).

----------End Footnotes----------

First, the Board's policy regarding searches of employee property is legally irrelevant to the search of Hearn's car. The Board's policy applies only to *intra*-school events, i.e., those involving only school officials and school employees. It provides what will happen when reasonable suspicion arises in an exclusively intra-school setting, as when school officials discover circumstances generating reasonable suspicion that an employee is using drugs.

That was not the case here. Reasonable suspicion arose in the context of a drug sweep of a parking lot by local law enforcement officers whose dog alerted at Hearn's car--a *law enforcement* event. Neither the Board's policy nor Hearn's contract of employment trumps the legal authority of law enforcement officers to perform such a sweep or the subsequent search. The officers' authority is limited only by the Constitution.

Hearn implicitly recognizes this distinction. She makes much of the fact that both the Superintendent and Herman testified that the

"reasonable suspicion" which required Hearn's consent to a drug test was based on the campus police officer's finding of marijuana in her car, an *intra*-school event, not on the [**8] dog sniff and alert, a county law enforcement event. Her argument is that since a campus police officer actually found the marijuana, the Board's policy governed his search and it should not have been conducted without her consent. Because the search was without her consent, no reasonable suspicion could arise from it and she was not required to consent to the drug test.

We find no basis in the law or in the real world to distinguish two legally distinct events in the one sweep and search. Merely because a campus police officer was present during the sweep and happened to be the one to find the marijuana does not change the fact that this was a law enforcement event, not bound by any school policy or employment contract. Even if, as Hearn argues, the Board's policy gave employee's a heightened expectation of privacy with regard to their personal property at school, that expectation does not bind local law enforcement. They are not parties to the contract. Whatever expectation of privacy Hearn had in her vehicle during a law enforcement event must be located in constitutional law, not local school board policies.

Second, the Constitution does not provide Hearn with any expectation of privacy in the odors emanating from her car. A dog sniff of a person's property located in a public place is not a search within the meaning of the Fourth Amendment. *United States v. Place,* 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) (sniff of a person's luggage is only minimally intrusive and is not a Fourth Amendment search); *Merrett v. Moore,* 58 F.3d 1547, 1553 n. 11 (11th Cir.1995) ("The use of dogs on the exterior of the cars constitutes no search"); *United States v. Seals,* 987 F.2d 1102, 1106 (5th Cir.1993) (sniff of vehicles exterior no search); *United States v. Morales-Zamora,* 914 F.2d 200, 205 (10th Cir.1990) (same); *United States v. Rodriguez-Morales,* 929 F.2d 780, 788 (1st Cir.1991)(same).

[*1333] Furthermore, the alerting of a drug-sniffing dog to a person's property supplies not only reasonable suspicion, but probable cause to search that property. *United States v. Banks,* 3 F.3d 399, 402 (11th Cir.1993) ("Probable cause arises when a drug-trained canine alerts to drugs"); *United States v. Scarborough,* 128 F.3d 1373, 1378 (10th Cir.1997) ("It is undisputed that a drug sniffing dog's detection of contraband in itself establishes probable cause for a search warrant").

When the property alerted to is in a vehicle, the Constitution permits a search of the vehicle immediately, without resort to a warrant. *California v. Acevedo,* 500 U.S. 565, 581, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991) (upholding warrantless search of a paper bag in an automobile which the police had probable cause to believe contained contraband); *United States v. Forker,* 928 F.2d 365 (11th Cir.1991); *See also Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

The search of Hearn's car, therefore, did not violate the Fourth Amendment. It was based upon the probable cause generated by the dog sniff, and justified by the automobile exception to the general requirement for a warrant.

Thus, there was a reasonable suspicion generated by these circumstances regarding Hearn's possible drug use. At this point, the Board's policy was triggered. n6 Hearn's refusal to give her consent to Board's request for a drug test gave rise to the possibility of her termination under that policy. Her subsequent termination, therefore, did not violate either her contract of employment nor the Board's policy, and she is not due to be reinstated for these reasons.

----------Footnotes----------

n6 Although the police officer told Hearn that she might be criminally charged, the *intra-school* employment investigation was governed by the Board's policy.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

Hearn's next argument is that she was wrongfully terminated for exercising her rights under the Fifth Amendment when she relied upon the exercise of her constitutional right to remain silent. She contends that because the officer *Mirandized* her, she cannot be terminated for exercising her right to remain silent. This argument is without merit. The production of body fluids is non-testimonial. *See Schmerber v. California,* 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Hearn has not offered any authority that the production of urine does not fall within this rule, nor do we know of any. *See National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (production of urine may be compelled). Hearn was not forced to testify against herself in violation of the Fifth Amendment. n7

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n7 We do not reach the issue of whether the Eleventh Amendment bars Hearn from recovering damages because we find against her on her claims.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

III.

Hearn's contract with the Board does not vitiate the authority of the law enforcement officers to search her car under the circumstances of this case. Nor were any of Hearn's constitutional rights violated. Accordingly, the judgment of the district court is AFFIRMED.

DISSENT:

FERGUSON, District Judge, dissenting:

I respectfully dissent.

It is important to note at the outset that this highly publicized case does not arise from a criminal proceeding. For that reason, in my opinion, the majority's scholarly discussion of probable cause is not dispositive on the questions presented. Central to one of the causes of action is whether reasonable suspicion as a basis for the termination of a teacher's employment was obtained in violation of an employment agreement.

There was no police detention or arrest; no law enforcement report of a crime; no probable cause affidavit filed; and no magistrate determination of probable cause. What is shown by undisputed facts is that a school security officer, assisted by a city [*1334] police canine officer who had been invited to assist the school in enforcement of its anti-drug policy, conducted a sweep search within the walls of a high school campus. During a walk through the student parking lot the dog alerted to the presence of a controlled substance outside the plaintiff's vehicle. On instructions of the school officer the canine officer directed his dog into the plaintiff's automobile through an open window where it allegedly alerted again to the still warm remains of a cigarette which was believed to be an illegal substance. Without securing a warrant, or the teacher's consent, the school officer entered the plaintiff's vehicle and retrieved the cigarette remnant. Purportedly the cigarette remnant field tested positive for marijuana. All of these events occurred before noon in the student lot where the vehicle was parked, unlocked and with the windows down. The substance was turned over to police and consumed during a police laboratory analysis. It was argued by counsel for Mrs. Hearn, and not disputed, that she was with her class at all times during the morning hours.

We may only speculate as to why no criminal action was taken. Perhaps law enforcement officials decided that (1) a warrant to impound and search the parked and unattended vehicle should have been obtained, (2) the lock down and sweep search for drugs within the confines of the school campus, was a school board matter and not a law enforcement event, (3) a linkage between the contraband and the vehicle owner, under the circumstances, was too tenuous to support a good faith prosecution, or (4) destruction of the infinitesimal amount

of contraband during the analysis, without prior notice to potential defendants, jeopardized a prosecution. Notwithstanding the reason it is clear that after the substance was seized by the school board, law enforcement officials totally distanced themselves from any further involvement in the case.

This is a simple civil case based on administrative action where the plaintiff alleges among other things, that the defendant, her employer, breached an employment agreement which had been hammered out to control the conduct of the parties in exactly the situation presented here. The contract provides that faculty and administrators are insulated from searches of their desks, personal items or vehicles by school personnel except with the prior consent of the employee, which consent shall not be withheld where there is reasonable suspicion to believe that the employee has violated a policy, regulation or criminal law. It is not disputed that the employment contract has no application in criminal proceedings which may result in a termination of employment in the event of a conviction. In pertinent parts the Board's "Drug-Free Workplace Policies and Procedures" provide:

XI. *All Current Employees*

A. Reasonable Suspicion (For Cause)

1. *Circumstances Giving Rise to Suspicion*

The School System requires all current employees to submit to alcohol and drug tests whenever supervisor observations or other objective circumstances reasonably support a suspicion that an employee may have alcohol and/or drugs present in his or her system or has otherwise violated the Board drugs and alcohol policy....

XVII. *Investigations and Searches*

All search requests must be approved by the Executive Director of Human Resources or designee.

> Where a supervisor has reasonable suspicion that an employee has violated this policy, the Administration may search and inspect.... *The Administration will search an employee's personal vehicles ... only with the employee's consent.* However, any employee refusing to cooperate will be subject to being reported to law enforcement officials, detention of his/her property and/or person pending the issuance of a search warrant upon probable cause, as well as discipline, up to and including discharge.

[*1335] School officials concede that the basis for their employment action was the seizure of the suspect cigarette fragments from the interior of the plaintiff's vehicle. Prior to the nonconsensual entry into the automobile, they admit, there was insufficient grounds to require submission to a drug test. Linda Herman, the plaintiff's principal, testified at the administrative hearing that:

> A. I think ... it is fair ... to ask somebody ... [to take a drug test] If we find drugs in their cars ...
> Q. And the reason you thought that was reasonable was that, however it got there, something had been found in her car.
> A. Right.
> A. It's fair to ask someone to have a drug test if you find something in their car ...
> Q. Was the only reason that you think it might have been a reasonable suspicion, that something was found in her car?
> A. That's correct.

Board Superintendent Patrick Russo also testified that the reasonable suspicion relied on, as a basis for requiring the drug test, derived from the discovery of marijuana in the plaintiff's automobile. He admitted that the Board had violated its own policy but defended the action on grounds that "the integrity of the policy, from my perspective, outweighed the violation of the procedure...." In other words, he is saying, the teacher's contractual right to privacy in her personal belongings is unenforceable because the Board's search, even though in violation of the contract, gave rise to suspicion that she violated its anti-drug policy.

Abandoning its earlier position, the Board does not argue here that the contract permits it to search without consent where the Administration has a suspicion that an employee has violated its drug policy. Indeed it is clear in the procedures that a non-consensual search of an employee's personal vehicle by Administration, even with reasonable suspicion, is prohibited. The new theories advanced by the Board, in defense to this federal lawsuit, are that the finding of reasonable suspicion is untainted because the dog's alert outside the vehicle, without the search, was sufficient to justify the administrative action, or no warrant was needed for an intrusive search because a local law enforcement officer was present. Neither theory was advanced by the Board during administrative proceedings and cannot be reconciled with the facts. Mrs. Hearn's injury resulted from an administrative action, which was governed by Board policy, unrelated to anything that could have been done in a criminal action. The local police officer did no more than bring a drug detection dog to the campus. He was then directed by the school board officer.

I would note further that the parties do not disagree that as a basic principle of any agreement a breach by one party relieves the other party of its obligation to perform. *Bradley v. Health Coalition, Inc.*, 687 So. 2d 329, 333 (Fla. 3d DCA 1997). That principle should control the outcome.

Mrs. Hearn, a teacher of constitutional law, knew of her rights under the agreement, and was understandably aggrieved by the unlawful conduct of her employer. She acted properly and reasonably in refusing to consent to a urinalysis until she could reach her attorney. n1 Even though it [*1336] breached its obligation under the agreement the employer was not without a remedy. Having forfeited its administrative remedy by the wrongful search, it could have pursued a criminal investigation.

- Footnotes - - - - - - - - - - - - - - - -

n1 After reaching her attorney several hours later Mrs. Hearn submitted to a urinalysis for controlled substances which was performed by a reputable laboratory. The results were negative. It is

generally accepted scientific knowledge that active ingredients in marijuana, tetrahydrocannabinols (THC), are not flushed from the body in hours. THC is stored in fatty tissue and can be detected by conventional laboratory testing for up to 30 days after ingestion for a casual user and can be found in the body of chronic users up to a year after last consumed. Testimony of Dr. Donald Roach, Analytical Biochemist, in *United States v. Roach,* No. 99 Cr. 6005 (S.D.Fla. Sept. 3, 1999).

No argument can be made that the delay in submitting to the test was intended to conceal the use of drugs or that the school board was hindered in its investigation. Clearly this case is not about drug possession or use by a high school teacher. Mrs. Hearn was fired because she challenged an unlawful school board action and delayed submission to a drug test while seeking the advice of counsel.

----------End Footnotes----------

Legally, the plaintiff's position is unassailable. But there are relevant factors beyond principles of contract law which have chilling ramifications. The plaintiff had been very critical of the School Board's policy of campus lock down searches for drugs which she likened to police state tactics. Because of her classroom criticism of the practice as unconstitutional, she was not in favor with the employer. Expectations of privacy guaranteed by the policy were ignored and the penalty imposed was the professional equivalent of the death penalty. The twenty-seven (27) year stellar career of a 1994 "Teacher of the Year" is shattered with only three (3) years remaining to retirement with benefits.

By the holding here the majority has recognized, implicitly, an illegal drugs exception to the law that the court will not rewrite private contracts between parties who are on equal footing. *Complete Interiors, Inc. v. Behan,* 558 So. 2d 48, 52 (Fla. 5th DCA 1990). It is widely recognized that in the nation's zealous war on drugs, rights secured by the Fourth Amendment have shrunk. *See* Robert W. Sweet, U.S. District Judge, *The War on Drugs is Lost,* National Review,

Feb. 1996, at 44 ("The rights of the individual have been curtailed in the name of the War on Drugs."). This may be the first case to hold that courts will not enforce private contract rights between an employer and employee, hammered out after negotiations to govern conduct of the parties in areas of privacy, where the employer has a suspicion, no matter how insubstantial, that the employee violated a drug policy. Not only is an outstanding high school teacher a casualty in this episode; so, incidentally, are basic contract principles.

Unquestionably the plaintiff's termination from employment as a teacher for not submitting to a drug test was an "intra school event". On the collateral point, whether the search for and seizure of contraband from the interior of the plaintiff's vehicle by a school board officer was a "law enforcement event", presents at least an issue of fact.

In my view this fact-driven case should go to a jury.

United States Court of Appeals
For the Eleventh Circuit

No. 98-8390

District Court Docket No. CV497-088

SHERRY HEARN,

Plaintiff-Appellant,

versus

THE BOARD OF EDUCATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

Before MARCUS, Circuit Judge, HILL, Senior Circuit Judge, and FERGUSON*, District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-

appellee, the costs on appeal to be taxed by the Clerk of this Court.

---

*Honorable Wilkie D. Ferguson, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation. FERGUSON, District Judge, dissented and filed an opinion.

Entered: October 6, 1999
For the Court: Thomas K. Kahn, Clerk
By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JAN 26, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8390-AA

SHERRY HEARN,

Plaintiff-Appellant,

versus

THE BOARD OF PUBLIC EDUCATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19 __, _____ F.2d ____).

Before: MARCUS, Circuit Judge, HILL, Senior Circuit Judge, and FERGUSON*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5),

the suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

James C. Hill
SENIOR CIRCUIT JUDGE

*Honorable Wilkie D. Ferguson, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

SHERRY HEARN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV 497-88
	)	
THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM,	)	
	)	
Defendant.	)	

ORDER

I. INTRODUCTION

In this 42 U.S.C. § 1983 case a discharged high school teacher asks this Court to invalidate a county school board's "Drug-Free Workplace" policy, under which teachers may be instructed, upon reasonable suspicion, to take a urinalysis drug test. In 1996, the defendant Board of Public Education for the City of Savannah and the County of Chatham (the "board") fired plaintiff Sherry Hearn for refusing its drug test after police found marijuana in her car while it was parked at the high school where she taught.

In response, Hearn brought this action against the Board, contending that it violated her Fourth, Fifth and Fourteenth Amendment rights. Doc. # 1 at 8-10. She also raises breach of contract and State constitutional claims, id. at 10-11, and seeks reinstatement plus various damages. Id. at 11-12. Both sides now

move for summary judgment. Doc. ## 11, 17. This Court applies the summary judgment principles explained in Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742-43 (11th Cir. 1996) and Cohen v. United American Bank of Cent. Fla., 83 F.3d 1347, 1349 (11th Cir. 1996).

II. BACKGROUND

On 4/4/96, campus and Chatham County, Georgia police teamed up to conduct a "drug lockdown" and random search for drugs at the Windsor Forest High School in Savannah, Georgia. Doc. # 1 at 3-4; # 18 at 1-2; # 22 at 1; doc. #13, exh. C, Board Hearing Transcript ("BHT") at 31. The routine drug sweep arose from the "zero-tolerance" anti-drug/alcohol/weapons policy enacted by the Board under its 1992 "Safe School Plan." BHT at 32, 34-35; see also id. at 36, (over 150 searches by 4/30/96); see also id. at 36, 59-60 (In 1993, the Board promulgated a "Drug-Free Workplace Policy" ("DFWP") governing its employees).

In the school's rear parking lot a drug-sniffing dog "alerted" at a vehicle owned by plaintiff Sherry Hearn, then a veteran teacher at that school. Id. At that moment her car was unlocked, its passenger side window was down, and a white "faculty" permit was clearly displayed on its dashboard. Doc. # 18 at 1-2; # 22 at 1; BHT at 33. Before the alert, no one had any reasonable suspicion or probable cause to believe that any narcotics might be found in Hearn's vehicle. Doc. # 18 at 2; BHT at 59, 100.

Obtaining neither a search warrant nor Hearn's consent, county sheriff's deputy Michael Street let the dog enter her car through the passenger window. Doc. # 18 at 2; BHT at 28, 30. The dog "alerted" on the vehicle's closed ashtray. BHT at 23. Campus Police Corporal Howard Uhrig, who accompanied Street, opened it and found a partially burned, hand-rolled cigarette. Doc. # 18 at 2-3; doc. # 16 at 2. He later claimed to have field-tested it positive for marijuana. Id. After Uhrig removed it from the car, he noticed the faculty permit on the dash and took it with him. Doc. # 18 at 4; BHT at 94. Uhrig and his superior then met with school principal Linda Herman. BHT at

82. Herman summoned and confronted Hearn, who denied knowledge or possession of any marijuana. Doc. # 1 at 4; doc. # 18 at 5. Hearn went to her vehicle and opened the trunk so Street could search it. BHT at 24, 33. He found nothing. Id.

Uhrig Mirandized Hearn with respect to the marijuana. Doc. # 18 at 5; BHT at 99-100. "The police also told her she probably would be charged with criminal possession of marijuana." Doc. # 13, exh. C (State Board Decision) at 9. When Hearn asked to see the evidence, Uhrig informed her that the cigarette "got messed up or crumbled during field testing," and thus never produced it. Doc. # 18 at 5-6; but see BHT at 77. Uhrig sent it off "to the Crime Lab," which confirmed the positive finding); id. at 99-1OO. Herman instructed Hearn to take a urinalysis drug test within the next two hours. Doc. # 18 at 6; doc. # 16 at 2-3.

Herman issued the instruction under the Board's DFWP, which is aimed at detect[ing] users and abusers of alcohol, drugs and other controlled substances." Doc. # 13 at 2 ¶ 7, exh. B at 1. The policy specifies that any required testing be conducted within two hours of an incident, doc. # 13, exh. B at 8 ¶ 2 (f), and that "[a]ny employee who tests positive... [for] alcohol, drugs or other controlled substances will be terminated." Id. at 1.

However, the policy also requires that current employees be tested only when "supervisor observations or other objective circumstances *reasonably* support a *suspicion* that an employee may have violated the Board drug and alcohol policy." Doc. # 13, exh. B at 7 (emphasis added).[23] "Reasonable suspicion *may* arise," the policy instructs, from

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1 The policy evidently was designed to conform to constitutional standards governing workplace searches. See Gossmeyer v. McDonald, 128 F.3d 481, 490-92 (7th Cir. 1997) (Warrantless search of state employee's office, desk, storage unit, and file cabinet was workplace search; if there are reasonable grounds to believe that a workplace search will uncover evidence of the government employee's

various factors enumerated in the policy. Id. (emphasis added); see also BHT at 37. None of them fit the facts here, but the list is not exclusive.

Hearn, who had never before exhibited any behavior consistent with any substance abuse, doc. # 18 at 7-8, objected to the drug-test as a matter of principle. BHT at 325-32. Herman provided her with a warning letter from the Board's then-Director of Human Resources, who also directed Hearn to take the drug test. Doc. # 22 at 9 ¶ 36; doc. # 13, exh. C, BHT exh. 2 ("in the course of a drug search, a substance [found to have tested positive for cannabinoid] was found in your personal vehicle.... Based on this finding, in compliance with BOE Policy 766 - Drug Free Workplace, you are hereby directed to submit to a drug test for reasonable suspicion within [the two-hour limit]. Your failure to comply may result in disciplinary action").

Plaintiff, however, could not reach her attorney until after the two hours elapsed; he convinced her the next day to take the test. Doc. #

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misconduct, the search is justified at its inception; hence, a workplace search is reasonable in scope if measures taken by the government employer are reasonably related to search's objective and they are not overly intrusive in light of the nature of the alleged misconduct); see also Pierce v. Smith, 117 F.3d 866, 880 (5th Cir. 1997) ("The search must be reasonable under all the circumstances, balancing the individual's privacy interests against the interests of the governmental institution").

The Board's policy distinguishes between the search of Board-owned property and employee-owned property, the latter of which requires the employee's consent prior to any search. See doc. # 13, exh. B at 13 ¶ XVII (warning, however, that refused consent may result in referral to law enforcement "as well as discipline, up to and including discharge").

18 at 7; # 16 at 3. Even though she at that time tested negative,[24] it was, according to the Board's policy, too late. Doc. # 18 at 7; # 16 at 3; # 13, exh. B at 8 ¶ 2 (f) (beyond the two hour limit is not permitted "because drugs and/or alcohol may be voided from [the employee's] system as a result of the additional delay"); BHT at 45-46.

In response, the school systems superintendent suspended plaintiff, then recommended termination for "insubordination" and "other good and sufficient cause" over her failure to timely take the drug test. Doc. # 1 at 6; doc. # 13 at 2; see also doc. # 13, exh. B at 13-14 ¶ XX(A) ("The School System will discipline employees in its sole discretion, up to an including immediate discharge...for any violation of this policy, including ...(2) refusing to submit to testing; (3) refusing to execute a release/consent form; (4) failing to cooperate with an investigation or search"); BHT at 61-62. Although he acknowledged that the Board failed to obtain Hearn's consent to search her car, BHT at 62-63, nevertheless he wanted to uphold "the integrity of the policy." BHT at 52-53.

The Board then provided plaintiff with a hearing. She appeared, with counsel, and testified. BHT at 304-417. At that time, she elicited principal Herman's concession that she did not believe the marijuana was Hearn's. BHT at 143-7. Nor did Herman suspect that Hearn had any drugs in her system that day, but simply insisted upon applying a uniform, no-exception application of the Board's drug-testing policy to all who are found with drugs in their actual or constructive possession. Id.

At the end of the hearing, the Board made no findings of fact but voted to accept the superintendent's recommendation and thus

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2 Defendant agrees only that Hearn took this test, but disputes the results, along with the chain of custody leading up to the test. Doc. # 22 at 11-12. For summary-judgment purposes only, the Court will assume that Hearn tested negative.

terminate Hearn. Doc. # 1 at 6; # 18 at 9; BHT at 445-48. Plaintiff appealed to the State Board of Education, which issued a written opinion upholding the Board. Doc. # 13, exh. C at 8-11. This action followed.

III. ANALYSIS

A. Due Process Claims

To the extent that Hearn is advancing property-interest based, procedural and substantive due process claims, they are barred by McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), as applied in Merritt v. Brantley, 936 F.Supp. 988 (S.D.Ga. 1996), and cited in Wallace v. Bd. of Regents of Univ. Sys. of Ga., 967 F.Supp. 1287, 1292-93 (S.D.Ga. 1997), and Board of Com'rs. of Effingham County v. Farmer, 228 Ga. App. 819, 822 (1997) (the "flaw is not the failure to exhaust but the failure to show absence of an adequate state remedy"); see also Jones v. Chatham County, Ga., 223 Ga. App. 455, 457 (1996).

B. Supplemental Jurisdiction - - State Law Claims

Hearn's contract and Georgia constitutional claims are pendent State law claims. See doc. # 1 at 8, 10-11. She alleges that the State (i.e., the local Board) intentionally breached its contract with her. The Board negated basic contractual provisions first by searching her vehicle without her consent, and second by ignoring and/or misapplying the contractual protections afforded to her during its administrative review process. Doc. # 3 at 5-6.

Because plaintiff raises federal constitutional claims, supplemental jurisdiction exists over her contract claim, which is not otherwise barred by the jurisprudential principles upheld by McKinney and Merritt because it is not based on a due process violation, but rather the violation of "private," contracted-for (hence, non-constitutional) rights. Likewise - - and although the Court is not required to inquire, see Acri v. Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir.1997)

(en banc) - - supplemental jurisdiction supports Hearn's State constitutional claims.

C. Administrative Exhaustion

Despite her failure to seek judicial review of the State Board's administrative review, Hearn was free to bring her case in this Court. See, e.g., Tallahassee Memorial v. Cook, 109 F.3d 693, 702 (11th Cir. 1997) (§ 1983 claim cannot be barred by failure to exhaust State remedies with respect to unreviewed administrative actions).

D. Res Judicata

Defendants raise a res judicata based argument. They contend that the Board and the State Board each acted in a judicial capacity and found facts. Doc. # 12 at 15-19. They further argue that, because Hearn did not appeal the State Board's decision through the State court system, she is barred from relitigating her employment discharge here - - most particularly her "state contract issues." Doc. # 12 at 6-7, 15-19.

The argument implicates (1) "merger and bar" claim preclusion, see Migra v. Warren City Sch. Dist. Bd. of Ed., 465 U.S. 75, 77 n.1 (1984); Publicis Commun. v. True North Communications, 132 F.3d 363, 365 (7th Cir. 1997), and the (2) "*de novo* factfinding" ban erected by Univ. of Tenn. v. Elliott, 478 U.S. 788, 799 (1985); see also Thornquest v. King, 82 F.3d 1001, 1004 (11th Cir. 196). Under (1), Hearn would be barred from litigating here any claims that she raised or could have raised before the Board. See Migra, 465 U.S. at 77 n. 1, 84-85. Under (2), the court would be required to pay deference to any facts the two boards, acting in a judicial capacity, may have found. See Elliott, 478 U.S. at 799.

Gjellum v. City of Birmingham, 829 F.2d 1056 (11th Cir. 1987), cited in Thornquest, analyzed these procedural distinctions at length. As for claim preclusion, the Full Faith and Credit Statute, 28 U.S.C. § 1738, applies only to judgments and records of State courts, not

State administrative agencies. Therefore no § 1983 claims can be precluded in this context. Id., at 1061; see also id. at 1070 (no preclusion "regardless of whether a court of the state from which the judgment arose would bar the section 1983 claim"); accord Dionne v. Mayor and City Council of Baltimore, 40 F.3d 677, 681-82 (4th Cir. 1994) ("We agree with ... [Gjellum] and, as did that court, hold that under federal common-law preclusion principles, the unreviewed state administrative agency decision at issue here does not have claim preclusive effect in a subsequent § 1983 suit even though the latter suit arises out of the same transaction or series of transactions").

So, even if either Board in this case qualifies as a tribunal "acting in a judicial capacity," Hearn is not precluded from raising legal claims that were or could have been raised before it. Nevertheless, Elliot directs federal courts not to engage in *de novo* review of the facts supporting § 1983 claims that are pursued through a State administrative hearing - - even if the claimant failed to appeal the result through the State's judicial system. Gjellum, 829 F.2d at 1602; Wallace v. City of Montgomery, 956 F.Supp. 965, 972-73 (M.D.Ala. 1996).

However, Elliot does not apply unless the State administrative tribunal acted in a judicial capacity. In Thornquest, for example, a college board's administrative determination to discharge a college professor did not preclude his § 1983, federal court action against the college and college officials because the board was acting as his employer, and not in a judicial capacity, when it discharged him. 82 F.3d at 1004. In addition, the issue of whether the discharge was in retaliation for exercise of his First Amendment rights simply could not have been before the board - - or otherwise properly litigated - - since it was the board which in fact discharged him. Id.

Here the Board engaged in no specific factfinding. Indeed, it simply made its decision at the end of the hearing. BHT at 446-48. And, it indisputably acted as Hearn's employer; it did after all, *fire* her. Its "factfindings" therefore must be treated the same as the college board's in Thornquest.

While the State Board recited facts based on the Board's hearing transcript and exhibits, its vice Chairman, who wrote the State Board's "Decision," clearly sat in an appellate capacity. See Ransum v. Cattooga County Bd. of Educ., 144 Ga. App. 783, 785 (1978). He thus could not, in contrast to one acting in a judicial capacity, make credibility choices. That evidently is why O.C.G.A. § 20-2-1160(e) prevents that State Board from engaging in any *de novo* factfinding.

Hence, the State Board did not act "in a judicial capacity ...[and] resolve disputed issues of fact properly before it..." Elliott, 478 U.S. at 799 (internal quotes and cite omitted); Gjellum, 829 F.2d at 1062. See doc. # 13 at 3, ¶ 11 & exhs. C-D. Accordingly, no "merger and bar" claim preclusion applies here. Nor does Elliott's ban against *de novo* factfinding. The latter point, incidentally, is largely academic since nearly all of the facts here are undisputed.

E. Fourth Amendment Issues

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This guarantee extends to searches and seizures conducted not only by law enforcement, but also by government officials in civil arenas. See O'Connor v. Ortega, 480 U.S. 709, 714 (1987); New Jersey v. T.L.O., 469 U.S. 325, 343-48 (1985) (permitting warrantless search of a student's purse grounded in reasonable suspicion of presence of cigarettes; the State's interest in maintaining discipline in schools provides special need beyond criminal law enforcement, obviating the need for probable cause); Pierce v. Smith, 117 F.3d 866 (5th Cir. 197) (denying § 1983 claim against state hospital officials who ordered medical resident to take a drug test despite the absence of an official drug-testing policy).

"Where the right said to be violated is the Fourth Amendment, that plaintiff must establish a concrete violation of that right." Whiting v. Traylor, 85 F.3d 581, 586 (11th Cir. 1996). Thus, Hearn must demonstrate that a government search or seizure occurred *and* that it was unreasonable. Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997).

(1) Drug Testing Constitutes A Search

Even for students, who enjoy fewer constitutional protections than do adults in a public school setting, "a urinalysis drug-testing program qualifies as a 'search' regulated by the Fourth Amendment." Todd v. Rush County Schools, 983 F.Supp. 799, 1997 WL 710661 at * 5 (S.D.Ind.6/2/97), aff'd., ____ F.3d ____, 1998 WL 7352 (7th cir. 1/12/98) (Program under which all high school students who wished to participate in extracurricular activities had to consent to random and suspicionless urine testing for alcohol, unlawful drug, and cigarette usage did not violate students' Fourth Amendment right to be free from unreasonable searches).

This Court likewise holds that the drug testing requirement imposed upon Hearn constituted "a search within the meaning of the Fourth and Fourteenth Amendments." Chandler v. Miller, 117 S. Ct. 1295, 1300 (1997); see also Stigile v. Clinton, 110 F.3d 801, 803 (D.C.Cir. 1997) (because government compelled urinalysis is search for purposes of Fourth Amendment, it is impermissible if it is unreasonable). The next issue, then, is whether the search was reasonable. See Evans, 117 F.3d at 1320.

(2) Reasonableness

To be reasonable under the Fourth Amendment,

> a search ordinarily must be based on individualized suspicion of wrongdoing. But particularized exception to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement." When such "special needs" - - concerns

> other than crime detection - - are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.

Chandler, 117 S.Ct. at 1300 (cites omitted).

In other words, the government actor conducting a search or seizure must, depending on the circumstances, have a warrant or probable cause,[25] or be able to cite to a "special need" for not doing so. See U.S. v. Ward, 131 F.3d 335 (3rd Cir. 1997) (upholding warrantless blood testing of rape suspects); id. at 342 ("The special needs in this case are insuring that victims of sexual assaults are notified promptly, whether or not their attackers carry HIV, and preventing a sexual assault victim from unwittingly transmitting the virus to others"); O.C.G.A. § 17-10-15(b) (probable cause required for similar testing in Georgia).

The State of Georgia failed to present "special needs" in Chandler, where the Supreme Court invalidated a Georgia statute requiring candidates for State office to submit certification of negative drug test results. In upholding the statute, the Eleventh Circuit relied extensively on the Supreme Court's "special needs" opinions in Treasury Employees v. Von Raab, 489 U.S. 656 (1989) and Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989). See Chandler v. Miller, 73 F.3d 1543, 1545-48 (11th Cir. 1996).

The Chandler court distinguished those cases, as well as Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995), which sustained a drug-testing program for student athletes. The "drug-free" candidate program, the court pointed out, could be easily evaded, 117 S.Ct. at

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3 That is, the actor must apply the traditional probable cause formulation, see Illinois v. Gates, 462 U.S. 213, 238 (1983) (this is a "practical, common-sense decision whether, given all the circumstances .... there is a fair probability" that the facts to which the probable cause determination is addressed exist).

1304, represented "no credible means to deter illicit drug users from seeking election to state office," id., and simply did not implicate the same set of "special needs" surrounding firearm-carrying, drug-interdicting agents (Von Raab), employees engaged in "safety-sensitive tasks" (Skinner) or "a sharp increase in drug use" by school students otherwise subject to *in loco parentis* control (Vernonia). Id. at 1304-05.

Moreover, Georgia simply failed to assert any evidence of a drug problem among elected officials who "typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aid[ed] no interdiction effort." Id. at 1305. At bottom, the program in Chandler was largely symbolic; personal privacy cannot be trumped "for a symbol's sake." Id.; Pierce, 117 F.3d at 874. The Chandler drug-testing program therefore constituted an unreasonable search supported by no "special need," thus violating the Fourth Amendment. Chandler, 117 S.Ct. at 1305.

The Chandler court distinguished Vernonia in part on grounds relevant here; given the *in loco parentis* factor and reduced constitutional freedoms students enjoy, public school officials can implement suspicionless drug-free ***student*** testing programs more easily than can non-school, government officials operating drug-free ***employee*** testing programs.[26] The instant case falls somewhere

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4 Under the "special needs" rationale, courts have repeatedly upheld suspicionless or near-suspicionless school searches by officials using search methods ranging from metal detectors to visual/manual inspection - - at both the individual and "full sweep" level. See Todd, __ F.3d at ___, 1998 WL 7352 at * 3; People v. Pruitt, 662 N.E.2d 540, 545-46 (Ill.App. 1st Dist. 1996) (Metal detector screening of students in public schools for weapons satisfied reasonableness requirement of Fourth Amendment, even though no individualized suspicion of wrongdoing was present and school board had not developed specific plan on random use of metal detectors; action was justified at its inception by reality of violence in schools and search as

conducted was reasonably related in scope to circumstances which justified interference in first place); Thompson v. Carthage Sch. Dist., 87 F.3d 979, 982 (8th Cir. 1996) (principal's decision to undertake generalized search in which all male students from grades six to twelve were searched for dangerous weapons by emptying their pockets and being patted down if metal detector sounded did not violate student's Fourth Amendment rights).

That does not mean, of course, that school officials possess carte blanche authority. As in the other "special needs" cases, the Vernonia Court took pains to stress that the testing of student athletes was a special context. The drug problem at that school and among its athletes was rampant, and student athletes would be particularly endangered if they used drugs. 515 U.S. at 661-63. And, the athletes' "role model" effect on drug use could not be discounted. Id. at 663. The severity of the problem outweighed the minor intrusion for drug testing. Id. at 664-65.

All of the above must be contrasted by cases where school officials zero in on a specific student or group, in which case some courts have held that reasonable suspicion is required. See DesRoches by DesRoches v. Caprio, 974 F. Supp. 542, 550-52 (E.D.Va. 1997) ((1) school officials may not search a large group of students for stolen property when school officials suspect that a student in the group is guilty of larceny, but the officials lack individualized suspicion as to any particular student; (2) search of backpacks of all 19 students in a class for a pair of sneakers believed to have been stolen violated Fourth Amendment; (3) student cannot be suspended for his refusal to give consent to what would be an unconstitutional search if conducted; (4) individualized suspicion could not be based on fact that search of consenting students failed to disclose missing sneakers); compare Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146, 1149 (7th Cir. 1997) ("[b]ecause of the special circumstances of the school context, school officials need not demonstrate the existence of any probable cause in order to justify a search of a student's person or property") (citing T.L.O., 469 U.S. at 340-42).

The most certain statement one can make about the law in this area

between Vernonia and Chandler. Hearn, after all, is not a student, just a teacher whose car fell within a Vernonia-authorized drug sweep aimed at students.

Yet Hearn presents an analytical wrinkle not seen in other cases: her superior ordered her drug test under the Board's drug-free *employee* policy, and not under a Vernonia-based, drug-free *student* policy. Their drug-sniffing dog alerted on Hearn's unattended vehicle - - an act that did not constitute a search, see Merrett v. Moore, 58 F.3d 1547, 1553 n. 11 (11th Cir. 1995) ("The use of dogs on the exterior of the cars constitutes no search"), and which typically supplies not only reasonable suspicion, but probable cause. See U.S. v. Banks, 3 F.3d 399, 402 (11th Cir. 1993) ("probable cause arises when a drug-trained canine alerts to drugs"); U.S. v. Scarborough, 128 F.3d 1373, 1378 (10th Cir. 1997) ("It is undisputed that a drug sniffing dog's detection of contraband in itself establishes probable cause for a search warrant"); see also U.S. v. Kennedy, 131 F.3d 1371, 1376-77 (10th Cir. 1997) (search warrant based on narcotics canine alert will generally be sufficient on its face if affidavit states that dog is trained and certified to detect narcotics).[27]

At that point Uhrig did not need a warrant to search Hearn's car, including its ashtray. See California v. Acevedo, 500 U.S. 565, 581 (1991) (upholding warrantless search of a paper bag in an automobile which the police had probable cause to believe contained contraband);

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is that it is uncertain. See Jenkins By Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 827 n. 6 (11th Cir.) (en banc), (noting significant judicial disagreement over just what is "reasonable" in the school context); id. at 828 ("T.L.O. did not attempt to establish clearly the contours of a Fourth Amendment right as applied to a wide variety of possible school settings different from those involved in T.L.O."), cert. denied, 118 S.Ct. 412 (1997).

5 According to deputy Street, "Corporal Sonya," able to detect one marijuana seed in a roomful of people, was "very reliable." BHT at 19-20, 25. She produced no "false alerts" in over 187 searches form the 11/95 - 4/96 time period. BHT at 20.

id. ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained").

That wrinkle figures into the Board's implicit concession that, had the "Vernonia" sweep not occurred, plaintiff's superior would have had to show reasonable suspicion under the Board's drug-free *workplace* policy before ordering any search of Hearn's car and any resulting drug test of Hearn herself. Doc. # 12 at 7-9. Yet, the dog-sniff "search" was not a "search." As a result of that sniff, however, the Board was able to confront Hearn with more than reasonable suspicion (i.e., probable cause).

In that respect, Hearn makes much of the fact that Uhrig was a member of the campus police and the Board's *workplace* policy requires consent to search what indisputably is her private property. See doc. # 19 at 10-11 (arguing that such consent requirement "raises ... teachers' expectations of privacy by requiring that the Board must comply with both an administrative and a judicial process before a search can take place"; Uhrig had time to obtain a warrant but did not; hence, the typical "dog sniff" cases are distinguishable because none dealt with a policy which required consent, thus raising privacy expectations to require a warrant).

But Hearn simply makes too much of both the Board's policy and the inconsistency it concedes. First, she does not challenge, on any sort of "fruit of the poisonous tree" analysis, the initial drug sweep by *county* law enforcement officers, who descended on the campus for a "Vernonia"-type mass search of, among other things, student automobiles.

Second, she does not challenge the State Board's finding that the dog alerted on her car in the presence of the county police. Not bound by the Board's policy or contract with Hearn, the county police were free, under the precedent set forth above, to search her car irrespective of the Board's policy and Hearn's non-consent, so it is immaterial whether Uhrig or a county sheriff's deputy opened her ashtray. Stated

differently, the intervention of non-campus law enforcement legally superseded the Board's consent requirement.

Third, Hearn's constitutional and contract claims fail even before reaching that point in the factual time line. Because a dog sniff is not a search, no one needed any permission, even under the Board's workplace policy, to sniff Hearn's car. Once the dog alerted, that reaction alone supplied the Board with the reasonable suspicion that it needed to request Hearn's consent to search her vehicle. At that point the Board was free, under the contract, to fire Hearn merely to consent to the search of her car. See supra note 1. Because she had no choice, the fact that the county/campus police searched her car without her consent constitutes at most a technical contract violation, while the law requires only substantial compliance.[28] The sniff supported the search which turned up marijuana, thus reinforcing (with probable cause) the reasonable suspicion that the Board needed to demand the drug test. Upon Hearn's refusal of that (i.e., the drug-test) search, the Board was contractually authorized to terminate her. See doc. # 13, exh. B at 13-14 ¶ XX(A)(2).

In that regard, Hearn's contention that the police should not have been dog-sniffing her car in the first place - - because it violated her Fourth Amendment-based expectation of privacy - - must be rejected on the facts. After over twenty years of teaching, she knew or should have known that campus drug-sweeps were to be expected. Corporal

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6 The "general rule with respect to compliance with contract terms is not strict compliance, but substantial compliance. At common law a strict and literal performance of the terms of the contract was required; but by rules of equity, either adopted by statute or recognized by the courts, a substantial compliance with the terms of the contract is sufficient...." TRST Atlanta, Inc. v. 1815 The Exchange, Inc., t/k/a Barge-Wagener, Inc., 220 Ga. App. 184, 187-88 (1996)) (internal quotes and cites omitted); see also Building Materials Whsle., Inc. v. Reeves, 209 Ga. App. 361, 363 (1993) (applying "substantial compliance" rule to employment contract).

Uhrig testified that (a) the police searched her car in a "student lot"; and (b) he thought it belonged to a student when he opened the ashtray and discovered the marijuana.[29] In these circumstances, society is simply not prepared to recognized Hearn's expectation of privacy as reasonable.[30]

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7 Uhrig testified that the police typically did not search teachers' parking lots. BHT at 71. In fact, he thought he and his colleagues were searching only a student parking lot - - and thus a student's vehicle - - when they encountered and searched Hearn's car. BHT at 71-72, 87-92, 94, 96 ("Q. [Y]ou simply assumed that if [Hearn's car] was in that lot, it belonged to a student? A. Yes, sir"); id. at 102-03. In fact, Uhrig believed that faculty parked in the front of the school, and not in the back lot, where Hearn's car was found. Id. at 96. All of the schools have separate lots for student and faculty. Id. at 98. In his experience, no teachers had parked in the back lot before. Id. at 108, 109. Nor was he aware of any distinction between student and faculty parking permits. Id. at 88, 96-97; see also id. at 27 (Street similarly was unfamiliar). Street was already inside Hearn's vehicle, searching the front seat area, when Uhrig entered and opened the ashtray. Id. at 91-92.

8 Drug dogs conduct warrantless sniffs of luggage on airport luggage-conveyor belts, of lockers in bus stations, and of vehicles sitting in traffic jams created by police roadblocks. See U.S. v. Place, 462 U.S. 696, 706 ("exposure of ...luggage...located in a public place, to a trained canine [does] not constitute a 'search' within the meaning of the Fourth Amendment"); Merrett, 58 F.3d at 1550-51. In a strictly analytical sense, Hearn's car was functionally no different than such luggage, or a vehicle in a roadblock jam. For that matter, Hearn does not (nor can she) claim any expectation fo privacy in odors emanating from her car, and she does not dispute that "Corporal Sonya" alerted upon them while sniffing the outside of Hearn's vehicle in a public parking lot.

These points underscore the fact that the Fourth Amendment is context-sensitive. See T.L.O., 469 U.S. at 337; Rossi v. Town of Pelham, 1997 WL 816160 at *3 (D.N.H. 9/29/97) (unpublished).

From this point Hearn's remaining Fourth Amendment and contractual arguments rapidly proceed downhill. She presents no viable grounds for challenging the operational aspects of a drug test she never took, and what the policy demands produces a minimally invasive impact of a scale that has been repeatedly upheld by other courts. See, e.g., Pierce, 117 F.3d at 874-75. In terminating her for insubordination, the Board did not violate plaintiff's Fourth Amendment or contractual rights.

(3) Fourth Amendment Facial Challenge

Hearn also facially challenges the Board's workplace drug-testing program, contending that it violates that Fourth amendment on its face. She principally relies on National Federation of Federal Employees v. Cheney, 680 F.Supp. 416 (D.D.C. 1988), aff'd. in part, vacated in part, and remanded, 884 F.2d 603 (D.C.Cir. 1989) (compulsory, random drug testing of civilian employees who occupied positions in aviation, police and guard, and direct service staff who were primarily drug counselors, did not violate Fourth Amendment, but drug testing of laboratory workers and those in specimen chain of custody violated Fourth Amendment), cert. denied, 493 U.S. 1056 (1990); see also National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C.Cir. 1989), along with this Court's decision in National Federation of Federal Employees v. Weinberger, 651 F.Supp. 726 (S.D.Ga. 1986). Doc. # 19 at 19-24.

Greater governmental scrutiny is expected in the public workplace - - most especially in schools, where teachers are entrusted with the nation's children - - than in the home. See, e.g., Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174, 178-83 (1st cir. 1997) (employees lacked objectively reasonable expectation of privacy against disclosed, soundless video surveillance while toiling in open and undifferentiated work area; employees lacked fundamental right to be free from surveillance). Correspondingly, privacy expectations are adjusted downward in that context. Rossi, 1997 WL 816160 at *8. Hearn is simply of sync here.

None of those cases focus on teachers and governmental interests in drug-free schools. Compare Patchogue-Medford Congress of Teachers v. Board of Educ. of Patchogue-Medford Union Free School Dist., 517 N.Y.S.2d 456, 510 N.E.2d 325, 328 (N.Y. 1987) (school district could not require all probationary teachers to submit to urinalysis to detect potential drug abuse, absent reasonable suspicion of drug use), cited in Ann., *Drug Testing of Public Employees*, 86 ALR Fed. 420 § 3(I) (Teachers); with Seelig v. Koehler, 556 N.Y.S.2d 832, 556 N.E.2d 125 (N.Y. 1990) (random drug testing program for correction officers was not constitutionally infirm).

Furthermore, all of Hearn's cases, including the Patchogue case located by this Court, focus on *random* or otherwise suspicionless drug testing, which is simply not the case here. The Board's policy required reasonable suspicion before it could drug-test Hearn, the police supplied it,[31] and only then was it applied to her. All of Hearn's cases are easily distinguishable, no constitutional infirmity has been shown with respect to the manner in which the Board applied its policy to plaintiff, and no facial invalidity grounds have been demonstrated here.

F. Fifth Amendment

The Fifth Amendment privilege against self-incrimination, which is

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9 Hearn contends that the partially smoked marijuana cigarette was not sufficient to supply reasonable suspicion because it was not "warm, smoldering or otherwise shown to have been recently smoked" when Uhrig found it. Doc. # 19 at 25. Not surprisingly, she cites no authority on this point. Were this the standard, students and teachers could literally smoke a marijuana cigarette during their morning drive to school, then quickly defeat the Board's drug detection program merely by waiting a half hour or so (about the time it would take for all residual heat to dissipate) before parking in a school lot. The Fourth Amendment jurisprudence simply does not demand that level of precision.

normally not self-executing, extends to "'any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.'" U.S. v. Meyers, 123 F.3d 350, 359 (6th Cir.), cert. denied 118 S.Ct. 611 (1997) (quoting Maness v. Meyers, 419 U.S. 449, 464 (1975)); U.S. v. Argomaniz, 925 F.2d 1349, 1352-53 (11th Cir. 1991). However, it may be invoked only if the witness reasonably believes that the information sought could lead to the criminal prosecution of him. U.S. v. Gecas, 120 F.3d 1419, 1424 (11th Cir. 1997) (en banc); In re Grand Jury Subpoena Dated April 9, 1996, 87 F.3d 1198, 1200 (11th Cir. 1996); Argomaniz, 925 F.2d at 1353 (the witness must show a "substantial and real hazard of self-incrimination").

Public employees facing an internal workplace investigation are entitled to "Garrity" immunity, "so that statements made for internal investigations will not be used against [them] in a criminal prosecution." Harrison v. Wille, 132 F.3d 679, 681 n. 2 (11th cir. 1998) (citing Garrity v. New Jersey, 385 U.S. 493 (1967) and Lefkowitz v. Turley, 414 U.S. 70, 79-80 (1973)). Because a public employee can not be compelled to testify, or make a statement and in the process be forced to waive her Fifth Amendment rights, she cannot be terminated *solely* for exercising those rights. 132 F.3d at 682. "Considered along with other evidence, however, an adverse inference may be drawn from an employee's exercise of [her] Fifth Amendment right to silence." Id. at 683.

In Harrison, a sheriff's deputy investigated for evidence-room thefts was never provided Garrity immunity when, on three occasions, he was asked to provide statements. 132 F.3d at 681. On the other hand, he was not compelled to make any statements - - even during subsequent hearings - - and the sheriff's department ultimately fired him based upon independently uncovered evidence. Id. at 681-82. Because Harrison was never compelled to testify or provide any statements, he was "not faced with the choice to make a statement or be fired." Id. at 683. Other evidence surfaced, and that was sufficient to justify his discharge. Since he could not be said to have been fired solely because he had exercised his right to remain silent, the department did not violate his Fifth Amendment rights. Id. at 683.

Hearn argues that, because Uhrig Mirandized her and thus injected the possibility of a criminal prosecution into the situation, the Board violated her Fifth Amendments rights by coercing (upon the pain of employment discharge) her into supplying urine so it could be used against her in a criminal prosecution. She thus analogizes this case to the Garrity context. Doc. # 15 at 16-19.

In Termunde v. Scovell, 5 F.3d 547, 1993 WL 318828 (10th Cir. 1993) (unpublished), the court rejected a Fifth-Amendment, "forced testimony" challenge to a prison's random drug testing program. The Tenth Circuit pointed to a variety of opinions which

> Have addressed the constitutionality of the privacy intrusion of forcing production of body fluids. See South Dakota v. Neville, 459 U.S. 553, 563 (1983) (holding Fifth Amendment values not hindered when suspect is offered choice of submitting to body fluid test or having his refusal to submit used against him); Schmerber v. California, 384 U.S. 757, 761 (1966) (holding withdrawal of blood for alcohol analysis is not "testimonial" or "communicative" and therefore does not violate Fifth Amendment privilege)....

Id., 1993 WL 318828 at ** 1; see also Rushton v. Nebraska Public Power Dist., 653 F.Supp. 1510, 1528 (D.Neb. 1987) ("The chemical analysis results of the plaintiffs' urine are not evidence of a testimonial or communicative nature"), aff'd., 844 F.2d 562 (8th Cir. 1988); Burka v. New York City Transit Authority, 680 F.Supp. 590, 611 (S.D.N.Y. 1988) ("We find that the results that would be obtained by drug testing, whether or not compelled, do not constitute testimonial evidence as that term is construed under the fifth amendment"); Smith v. City of East Point, 189 Ga. App. 454, 457 (1988) ("[Fireman's] constitutional privilege against self-incrimination was not violated by the taking of the urine sample. [Cits.] It is argued that the taking of the urine sample violated Art. I Sec. I, Par. X of the Const. of the state of Ga....We find no violation of the cited constitutional provision").

Hearn was not forced to testify, only to provide a urine specimen. She has not shown this Court any legal authority for holding that such

evidentiary (as opposed to testimonial) production violated her Fifth Amendment right to remain silent.

G. Georgia Constitutional Rights

No one doubts that Hearn enjoys due process and liberty rights, as well as the right to be free from unreasonable search and seizure, under Art. 1, § 1 ¶¶ 1 & 13 of the 1983 Georgia Constitution. However, she has failed to advance those rights here. Hence, these claims are abandoned. See Doe By and Through G.S. v. Johnson, 52 F.3d 1448, 1457 (7th Cir. 1995) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority, forfeits the point"); Bardney v. U.S., 959 F.Supp. 515, 518 (N.D.Ill. 1997).

For that matter, the Court has been shown no legal authority demonstrating that Hearn enjoys greater rights under the Georgia, as opposed to the Federal Constitution, see Wells v. State, 180 Ga. App. 133, 134 (1986) (the protection against unreasonable searches provided in the Georgia Constitution is the same as that provided by the U.S. Constitution), thus warranting a different result even if this Court considered such claims. Defendants therefore are entitled to summary judgment on all of Hearn's claims.

H. Eleventh Amendment Immunity

Additional, independent grounds support part of the above result. Hearn's general and compensatory damages claims (see doc. # 1 at 12; # 3 at 5) are aimed at the Board, and thus the State. See DeKalb County School Dist. v. Shrenko, 109 F.3d 680, 689 (11th Cir.) (A county school district and its Board of Education constitute a political subdivision of the State), cert. denied, 118 S.Ct. 601 (1997). Hence, those claims are barred by the Eleventh Amendment. Powell v. Dept. of Human Resources of state of Ga., 918 F.Supp. 1575, 1578 (S.D.Ga. 1996) (§ 1983 "is not a waiver of Eleventh Amendment immunity"), aff'd., 114 F.3d 1074 (11th Cir. 1997); Harris v. Hayter, 970 F.Supp. 500, 502 (W.D.Va. 1997) (Congress did not abrogate

Eleventh Amendment immunity from § 1983 money damage claims, though injunctive relief is still available). See also Smith v. Avino, 91 F.3d 105, 107 (11th Cir. 1996) (because Eleventh Amendment immunity is considered to be in the nature of subject matter jurisdiction, it "can be considered at any time in the litigation and cannot be waived by the parties").

IV. CONCLUSION

The defendant Board's Motion For Summary Judgment (doc. # 11) is GRANTED. Plaintiff Sherry Hearn's Motion For Partial Summary Judgment (doc. # 17) is DENIED, and her Complaint is DISMISSED WITH PREJUDICE. The parties shall bear their own costs.

SO ORDERED, this 25th day of February, 1998.

/S/

B. Avant Edenfield, Judge
United States District Court
Southern District of Georgia

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

Southern District of Georgia

SHERRY HEARN

JUDGMENT IN A CIVIL CASE

v. CASE NUMBER: 497CV-88

THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM

Jury Verdict This action came before the Court for a trial by jury. The issues have been tied and the jury has rendered its verdict.

x **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that in accordance with the Order of the Court entered February 25, 1998, the Defendant's Motion for Summary Judgment is GRANTED. Plaintiff Sherry Hearn's Motion for Partial Summary Judgment is DENIED, and Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

E. O. D.
2-26-98
fh

February 26,1998
Date

Henry R Crumley, Jr.
Clerk

Faye B. Harris
(By) Deputy Clerk